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SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963/

No. 35 //

DEWEY McLAUGHLIN, ET AL., APPELLANTS,

vs.

FLORIDA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

FILED OCTOBER 28, 1963

PROBABLE JURISDICTION NOTED APRIL 27, 1964

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 585

DEWEY McLAUGHLIN, ET AL., APPELLANTS,

vs.

FLORIDA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

INDEX

	Original	Print
Record from the Criminal Court of Record in and for Dade County, Florida		
Notice of appeal	2	1
Stipulation enlarging time for filing record on appeal	4	2
Order enlarging time for filing record on appeal	6	2
Information	10	3
Motion to quash information	12	5
Minute entry	13	6
Order denying motion to quash	14	6
Arraignment and pleas of not guilty	14	6
Verdict of jury re Connie Hoffman	14	7
Verdict of jury re Dewey McLaughlin	15	7
Judgment and sentence re Connie Hoffman	15	8
Judgment and sentence re Dewey McLaughlin	16	9
Motion for new trial	17	10
Order denying motion for new trial	19	11
Minute entry of order setting supersedeas bonds and recitation of approval and filing thereof	21	12
Assignments of error	21	12
Certification as to payment of costs re Connie Hoffman	23	14

	Original	Print
Record from the Criminal Court of Record in and for Dade County, Florida—Continued		
Certification as to payment of costs re Dewey McLaughlin	23	14
Designation of record on appeal	23	14
Transcript of proceedings, June 27, 1962	26	16
Appearances	26	16
Motion to try case with defendants' physical absence from the courtroom and denial there- of	28	16
Transcript of proceedings, June 28, 1962	30	18
Appearances	30	18
Colloquy between Court and counsel	31	18
Opening statement on behalf of Florida by Mr. Gold	32	19
Opening statement on behalf of defendants by Mr. Graves	34	20
Testimony of Dora Goodnick— direct	36	21
Offer in evidence	46	27
Testimony of Dora Goodnick— cross	46	27
Stanley Marcus— direct	56	33
Nicholas Valeriani— direct	68	40
cross	73	43
redirect	75	44
Stanley Marcus— (resumed)— direct	78	46
cross	82	48
Nicholas Valeriani— direct	85	50
cross	95	56
Colloquy between Court and counsel	103	60

Record from the Criminal Court of Record in and
for Dade County, Florida—ContinuedTranscript of proceedings, June 28, 1962—Con-
tinued

Testimony of Nicholas Valeriani—

(resumed)—

redirect	111	65
recross	112	65
Sy Lippman—		
direct	114	67
Curtis Hobson—		
direct	120	70
Josephine DeCesare—		
direct	124	73
Dorothy Kaabe—		
direct	141	82
cross	145	85
Motion for directed verdict and denial thereof	152	89
Waiver of arguments by counsel for the parties	157	92
Court's charge to jury	158	92
Verdicts of jury	166	97
Sentencing of defendants	167	98
Clerk's certificate (omitted in printing)	169	98
Proceedings in the Supreme Court of the State of Florida	185	98
Application for oral argument	185	98
Opinion, Caldwell, J.	202	99
Petition for rehearing	207	102
Reply to petition for rehearing	210	104
Order denying petition for rehearing	213	105
Notice of appeal to the Supreme Court of the United States	215	106
Clerk's certificate (omitted in printing)	219	108
Order noting probable jurisdiction	220	108

1
[fol. 2]

**IN THE CRIMINAL COURT OF RECORD,
IN AND FOR DADE COUNTY, FLORIDA**

No. 62-1385

—
STATE OF FLORIDA,

—vs.—

DEWEY McLAUGHLIN and CONNIE HOFFMAN a/k/a
CONNIE GONZALEZ, Defendants.

—
NOTICE OF APPEAL

Come now the defendants, Dewey McLaughlin and Connie Hoffman a/k/a Connie Gonzalez and enter their appeal to the Supreme Court of Florida to review the judgment of the Criminal Court Of Record In And For Dade County, Florida, bearing date the 28th day of June, 1962 entered in the above styled cause and recorded in Book 79 at Pages 3 & 4 on the 28 day of June, 1962, and all parties to said cause are called upon to take notice of the entry of this appeal.

Robert Ramer, 305 N. W. 27 Avenue, Miami, Florida
and

G. E. Graves, Jr., 802 N. W. Second Avenue, Miami,
Florida, Attorneys for Defendants, By G. E.
Graves, Jr.

Clerk's Certificate to foregoing paper (omitted in printing).

Certificate of service (omitted in printing).

[Stamps

Filed Jul 16, 1962, J. F. McCracken, Clerk

Filed Jul 18, 1962, Guyte P. McCord, Clerk, Supreme
Court, by (Signature illegible), Deputy Clerk]

[fol. 4]

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

No. 62-1385

[Title omitted]

STIPULATION ENLARGING TIME FOR FILING
RECORD ON APPEAL

It is hereby stipulated and agreed between G. E. Graves, Jr., attorney for the defendants, and the Office of the Attorney General of the State of Florida that the time for filing record on appeal be enlarged thirty (30) days, the said period to begin on August 31, 1962.

Office of the Attorney General, State of Florida,
By James G. McHorner.

G. E. Graves, Jr., Attorney for the Defendants.

Clerk's Certificate to foregoing paper (omitted in printing).

[Stamp—FILED SEP 7 1962 (Signature illegible), Clerk
Criminal Court]

[fol. 6]

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

No. 62-1385

[Title omitted]

ORDER ENLARGING TIME FOR FILING RECORD
ON APPEAL—September 27, 1962

This cause this day coming on to be heard upon the motion of the defendants for an order enlarging the time for the Clerk's filing the record on appeal, and the Court being fully advised as to its judgment, it is thereupon

Ordered and Adjudged that the time for filing record on appeal be, and the same is hereby enlarged for twenty (20) days from the date of the entry of this order.

Done and Ordered this 27th day of September, 1962.

Gene Williams, Judge of Criminal Court of Record.

Clerk's Certificate to foregoing paper (omitted in printing).

[Stamp—FILED OCT 1 1962, GUYTE P. McCORD, Clerk Supreme Court, by (signature illegible), Deputy Clerk]

[fol. 10]

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, STATE OF FLORIDA,
DIVISION B

February Term, 1962

62-1385

THE STATE OF FLORIDA,

VS.

CONNIE HOFFMAN, also known as CONNIE GONZALEZ
and DEWEY McLAUGHLIN.

INFORMATION FOR NEGRO MAN AND WHITE WOMAN
HABITUALLY OCCUPYING SAME ROOM—
Filed March 1, 1962

In the Name and by Authority of the State of Florida:

Richard E. Gerstein, State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida, in the County of Dade, under oath, information makes that Connie Hoffman, also known as Connie Gonzalez and Dewey McLaughlin on the 23rd day of February, 1962, in the County and State aforesaid, the said Dewey McLaughlin being a negro man and the said Connie Hoffman, also known as Connie Gonzalez, being a white woman, who were not married to each other, did habitually live in and occupy in the nighttime the same room, in violation of 798.05 F. S.,

JHB:hht

2-28-62

contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

Richard E. Gerstein, State Attorney, Eleventh Judicial Circuit of Florida.

[fol. 11]

State of Florida:

County of Dade:

Personally appeared before me, Richard E. Gerstein, State Attorney of the Eleventh Judicial Circuit of Florida, who, being first duly sworn, says that the allegations set forth in the within Information are based upon facts that have been sworn to as true, and which facts, if true, would constitute the offense therein charged.

Richard E. Gerstein, State Attorney, Eleventh Judicial Circuit of Florida.

Sworn to and subscribed before me this 28th day of February, 1962.

J. F. McCracken, Clerk, Criminal Court of Record,
Dade County, Florida, By Jean Williams, D. C.

(Seal, Criminal Court of Record).

Defendants Connie Hoffman, also known as Connie Gonzalez and Dewey McLaughlin, arraigned in open Court on the within Information and pleaded not guilty.

T. C. Blount, Jr., Deputy Clerk, Criminal Court of Record, Dade County, Florida.

[fol. 12]

[File endorsement omitted]

Witnesses for the State

1. Dora Gootnick, 732 2nd Street, Miami Beach, Fla.
2. N. P. Valeriani and
3. Stan Marcus, MBPD

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

MOTION TO QUASH INFORMATION—Filed April 11, 1962

Come now the defendants, by their undersigned counsel and move to quash the information filed against both of them and assign as reasons therefor the following:

1.

The information is vague, indefinite, uncertain and insufficient.

2.

The said information is so framed as to hinder and embarrass the defendants in such a manner as to prevent a fair trial.

3.

The information charges the defendants with a violation of Section 798.05, Florida Statutes, 1961, which statute is contrary to the constitution and laws of the State of Florida and the United States of America and is therefore null and [fol. 13] void for the following reasons:

a. The statute is so vague, indefinite and uncertain that it cannot be reasonably applied by the court of law.

b. The application of the statute is a denial of the defendants of the equal protection of the laws guaranteed by the constitution and laws of the United States of America.

c. The application of the statute is a denial of the defendants of the due process of law guaranteed by the constitution and laws of the United States of America.

d. The application of the statute is an invasion of the defendants' right to privacy.

G. E. Graves, Jr., Attorney for Defendants, 802
N. W. 2nd Avenue, Miami, Florida.

Certificate of service (omitted in printing).

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

MINUTE ENTRY—April 12, 1962

Division "A"

The Calendar Originally Scheduled for Division "B" of
This Court Was Disposed of as Follows:

Book 74 Page 44

Division "A"

April 12, 1962

[fol. 14]

STATE OF FLORIDA,

vs. #62-1385

CONNIE HOFFMAN, also known as CONNIE GONZALEZ
and DEWEY McLAUGHLIN.

NEGRO MAN AND WHITE WOMAN HABITUALLY
OCCUPYING THE SAME ROOM

Edward S. Klein, Assistant State Attorney.

G. E. Graves, Jr., Counsel for the Defense.

Counsel for the Defense presented a pending Motion to
Quash the Information, which Motion the Court denied.

The Defendants, Connie Hoffman, also known as Connie
Gonzalez and Dewey McLaughlin, were arraigned in open
Court by Edward S. Klein, Assistant State Attorney, and
each pleaded not guilty.

Book 74 Page 46

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

Case No. 62-1385-A

THE STATE OF FLORIDA,

v.

CONNIE HOFFMAN also known as CONNIE GONZALEZ.

VERDICT—June 28, 1962

We, the jury, at Miami, Dade County, Florida, this 28th day of June A. D. 1962, find the defendant, Connie Hoffman [fol. 15] also known as Connie Gonzalez, Guilty.

So Say We All.

Lauren S. Seabold, Foreman.

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

Case No. 62-1385-B

THE STATE OF FLORIDA,

v.

DEWEY McLAUGHLIN.

VERDICT—June 28, 1962

We, the jury, at Miami, Dade County, Florida, this 28th day of June A. D. 1962, find the defendant, Dewey McLaughlin, Guilty.

So Say We All.

Lauren S. Seabold, Foreman.

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

Case No. 62-1385-A

JUDGMENT—June 28, 1962

It appearing unto this Court that you, Connie Hoffman, also known as Connie Gonzalez, have been regularly tried and convicted of Negro Man and White Woman, Not Being Married to Each Other, Habitually Living in and Occupying, in the Nighttime, the Same Room, in Violation of Chapter 798.05, Florida Statutes, 1961.

[fol. 16] It Is Therefore the Judgment of the law and it is hereby adjudged that you are and stand convicted of the offense as above set forth.

What have you to say why sentence should not now be imposed upon you?

Saying nothing that could influence the Court in its decision.

SENTENCE

It Is Further Considered, Ordered and Adjudged that you be imprisoned by confinement at hard labor in the Dade County Jail for a term of thirty (30) days, and that you pay a fine of One Hundred and Fifty and no/100 Dollars (\$150.00) and the costs of the Court herein, taxed at \$102.25, and in default of such payment that you be confined at hard labor in the Dade County Jail for an additional term of thirty (30) days.

Done and Ordered in open Court at Miami, Dade County, Florida this 28 day of June, A. D. 1962.

Gene Williams, Judge.

(Filing and Recording Stamp Omitted).

Div. A B/ C

Book 79 Page 3

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

Case No. 62-1385-B

JUDGMENT—June 28, 1962

It appearing unto this Court that you, Dewey McLaughlin, have been regularly tried and convicted of Negro Man and [fol. 17] White Woman, Not Being Married to Each Other, Habitually Living in and Occupying, in the Nighttime, the Same Room, in Violation of Chapter 798.05, Florida Statutes, 1961.

It Is Therefore the Judgment of the law and it is hereby adjudged that you are and stand convicted of the offense as above set forth.

What have you to say why sentence should not now be imposed upon you?

Saying nothing that could influence the Court in its decision.

SENTENCE

It Is Further Considered, Ordered and Adjudged that you be imprisoned by confinement at hard labor in the Dade County Jail for a term of thirty (30) days, and that you pay a fine of One Hundred and Fifty and no/100 Dollars (\$150.00) and the costs of the Court herein, taxed at \$21.45, and in default of such payment that you be confined at hard labor in the Dade County Jail for an additional term of thirty (30) days.

Done and Ordered in open Court at Miami, Dade County, Florida this 28 day of June, A. D. 1962.

Gene Williams, Judge.

(Filing and Recording Stamp Omitted).

Div. A B / C

Book 79 Page 4

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

MOTION FOR NEW TRIAL—Filed July 3, 1962

Come now the defendants by their undersigned attorneys [fol. 18] and move the Court to set aside the verdict of the jury rendered in the above captioned cause and to award the defendants a new trial on the following grounds:

1.

The verdict is contrary to law.

2.

The verdict is contrary to the weight of the evidence.

3.

The verdict is contrary to the law and the weight of the evidence.

4.

The Court erred in overruling the defendants' motion to quash.

5.

The Court erred by overruling the defendants' motion for leave to be tried in absentia.

6.

The Court erred in the course of the trial by permitting Nicholas Valerioni to give his opinion as to whether the defendants were colored or white based upon his observation of the defendants and other persons, rather than requiring him to apply the rule set forth in the Statutes of the State of Florida defining Negro or colored person.

7.

The Court erred by requiring the defendants to be physically present during the trial, this causing them to give self incriminatory evidence.

Robert Ramer, 305 N. W. 27 Avenue, Miami, Florida
and

G. E. Graves, Jr., 802 N. W. Second Avenue, Miami,
Florida, Attorneys for Defendants, By G. E.
Graves, Jr.

[fol. 19] Certificate of service (omitted in printing).

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

ORDER DENYING MOTION FOR NEW TRIAL - July 3, 1962

This cause this day coming on to be heard on the motion of the defendants for a new trial and the Court having heard arguments of counsel and now being fully advised as to its judgment, it is thereupon

Ordered and Adjudged that the motion for a new trial be, and the same is hereby denied.

Done and Ordered this 3rd day of July, 1962.

Gene Williams, Judge.

(Filing and Recording Stamp omitted.)

Book 79 Page 176

[fol. 21.]

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

MINUTE ENTRY—July 3, 1962

Division "B"

"...

"Counsel for the Defense orally presented a Motion to Set Supersedeas Bond, which Motion the Court granted, setting Supersedeas Bond at Five Hundred (\$500.00) Dollars, for each Defendant in the above styled cause.

Book 79 Page 327

RECITATION OF APPROVAL AND
FILING OF SUPERSEDEAS BONDS

(And on July 16, 1962, the Defendants posted Supersedeas Bonds, each in the amount of \$500.00, which said Supersedeas Bonds were duly approved and filed by the Clerk of the Court on said date.)

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

ASSIGNMENTS OF ERRORS—Filed August 2, 1962

Come now the defendants, and assign as errors upon which they intend to rely in the Supreme Court of Florida the following:

1. The Court erred in overruling the defendants' motion to quash, which motion raised the question of the unconstitutionality of Section 798.05 Florida Statutes, 1961 on the following grounds:

A. The Statute is so vague, indefinite and uncertain that it cannot be reasonably applied by a court of law.

B. That the application of the Statute is a denial to the defendants of the equal protection of the laws guaranteed by the Constitution and Laws of the United States of America.

[fol. 22] C. That the application of the Statute is a denial to the defendants of due process of law guaranteed by the Constitution and Laws of the United States of America.

D. That the application of the Statute is an invasion of the defendants' right to privacy.

2. That the Court erred in overruling the defendants' motion for leave to be tried in absentia.

3. That the Court erred in overruling the defendants' motion for new trial.

4. That the Court erred by permitting a witness, Nicholas Valerioni to state his opinion as to whether the defendants were colored persons or white persons based upon his observation of the defendants and other persons rather than requiring him to apply the rule set forth in the Statutes of the State of Florida defining Negro or colored persons.

5. That the Court erred by requiring the defendants to be physically present during the trial, thus, requiring them to give self-incriminatory evidence.

Jack Greenberg, Esquire, 10 Columbus Circle, New York, New York, Robert Ramer, Esquire, 305 N. W. 27 Avenue, Miami, Florida, H. L. Braynon, Esquire, 802 N. W. Second Avenue, Miami, Florida

and

G. E. Graves, Jr., Esquire, 802 N. W. Second Avenue, Miami, Florida, Attorneys for Defendants, By G. E. Graves, Jr.

Certificate of service (omitted in printing).

[fol. 23]

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

CERTIFICATION AS TO PAYMENT OF COSTS
RE CONNIE HOFFMAN

(And the Clerk of the Court does hereby certify that he totalled the costs appearing of record on the progress docket of Case No. 62-1385-A ((State of Florida vs. Connie Hoffman, also known as Connie Gonzalez)), which said costs amounted to \$102.25, and that the receipt of the Honorable Thomas J. Kelly, Metropolitan Sheriff, Public Safety Department, Dade County, Florida, for said amount, numbered 40547, is attached to the Supersedeas Bond filed in said cause.)

CERTIFICATION AS TO PAYMENT OF COSTS
RE DEWEY McLAUGHLIN

(And the Clerk of the Court does hereby certify that he totalled the costs appearing of record on the progress docket of Case No. 62-1385-B ((State of Florida vs. Dewey McLaughlin)), which said costs amounted to \$21.45, and that the receipt of the Honorable Thomas J. Kelly, Metropolitan Sheriff, Public Safety Department, Dade County, Florida, for said amount, numbered 40548, is attached to the Supersedeas Bond filed in said cause.)

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

DESIGNATION OF RECORD ON APPEAL—Filed August 2, 1962

The Clerk of the above styled court is hereby directed to prepare a transcript of the record in the above styled cause in accordance with the following directions:

[fol. 24] 1. Recite the filing of the information.

2. Recite the arraignment.

3. Recite the filing on the motion to quash of the defendants.

4. Recite the plea of the defendants.
5. Recite the verdict of the jury.
6. Recite the judgment of the Court.
7. Recite the defendants' motion for new trial.
8. Recite the order of the Court denying defendants' motion for new trial.
9. Recite the filing of the defendants' notice of appeal.
10. Recite defendants' posting of supersedeas bond.
11. Recite the entry of the Court's order fixing the amount and conditions of the supersedeas bond.
12. Recite the filing and approval of the supersedeas bond.
13. Recite the filing of the assignments of error.
14. Recite the directions to the Clerk.
15. Certify the transcript of proceedings before the Court in conformity with the Rules of Practice of the Supreme Court of Florida and certify that the defendants have paid all cost which have been incurred in this cause up to and including the time the appeal was taken.

Jack Greenberg, Esquire, 140 Columbus Circle, New York, New York, Robert Kamer, Esquire, 305 N. W. 27 Avenue, Miami, Florida, H. L. Braynon, Esquire, 802 N. W. Second Avenue, Miami, Florida, G. E. Graves, Jr., Esquire, 802 N. W. Second Ave-
[fol. 25] nue, Miami, Florida, Attorneys for Defendants, By G. E. Graves, Jr.

Certificate of service (omitted in printing).

[fol. 26]

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

No. 62-1385

STATE OF FLORIDA,

vs.

CONNIE HOFFMAN, also known as CONNIE GONZALEZ
and DEWEY McLAUGHLIN, Defendants.

Transcript of Proceedings—June 27, 1962

Proceedings had before the Hon. Gene Williams, Judge of the Criminal Court of Record, in and for Dade County, Florida, in the above-entitled case, commencing on June 27, 1962.

APPEARANCES:

Richard E. Gerstein, State Attorney, by Jack A. Tanksley and Myron Gold, Assistant State Attorneys, on behalf of the State of Florida.

C. E. Graves, Jr., Esq., on behalf of the Defendants.
[fol. 28] Thereupon the following proceedings were had:

The Court: Proceed.

**MOTION TO TRY CASE WITH DEFENDANTS' PHYSICAL ABSENCE
FROM THE COURTROOM AND DENIAL THEREOF**

Mr. Graves: May it please the Court, at this time on behalf of both defendants, we move for leave to try this case with the defendants physical absence from the courtroom.

Mr. Tanksley: Is that the end of your motion?

Mr. Graves: Yes.

Mr. Tanksley: To which the State objects, your Honor. The defendants should be present before the Court under the laws of the State of Florida and the jury certainly has a right to have an opportunity to see the defendants.

The Court: Do you wish to state any grounds for that motion?

Mr. Graves: May it please the Court, we submit that this is a trial of a misdemeanor and such being the case, at the election of the defendants, they may be tried in absentia with leave of Court.

We submit to your Honor that in this case the question of identification is very important, and that the defendants' presence before the jury could, and would, constitute self-incriminatory evidence.

Mr. Tanksley: Your Honor, I say this to the Court—[fol. 29] The Court: I will deny the motion. We have tried a few cases, misdemeanors, without the presence of the defendants, but it has been a very exceptional case and not too much involved, ordinarily, such as fishing without a license or something, but I don't think we have ever had such a situation where the Court granted leave in a formal trial to do without the presence of the defendants.

The motion is denied.

(Thereupon a jury was impanelled and sworn to try the case, and an adjournment was taken until 10 o'clock June 28, 1962.)

[fol. 30]

IN THE CRIMINAL COURT OF RECORD
IN AND FOR DADE COUNTY, FLORIDA

No. 62-1385

STATE OF FLORIDA,

vs.

CONNIE HOFFMAN, also known as CONNIE GONZALEZ
and DEWEY McLAUGHLIN, Defendants.

Transcript of Proceedings—June 28, 1962

Proceedings had and testimony taken before the Hon. Gene Williams, Judge of the above-styled Court and a jury, at the Dade County Courthouse, Dade County, Florida, in the above-entitled case, on June 28, 1962, pursuant to adjournment on June 27, 1962.

APPEARANCES:

Richard E. Gerstein, State Attorney, by Jack A. Tanksley and Myron Gold, Assistant State Attorneys, on behalf of the State of Florida.

C. E. Graves, Jr., on behalf of the Defendants.

[fol. 31] (Thereupon the following proceedings were had without the presence of the jury:)

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Graves: Before the jury comes in, your Honor, I would like to call your Honor's attention to the fact that at the arraignment both defendants filed motions to quash on the grounds that the Statute is so vague and indefinite as to be incapable of interpretation and also as being a restraint contrary to the Constitution and laws of the State of Florida and the United States, a denial of equal protection of laws.

At this time, your Honor, we wish to renew that motion.

Mr. Gold: That motion has been disposed of, your Honor, and was denied.

The Court: Apparently Judge Williard has already ruled on that.

Mr. Gold: I make a motion to strike counsel's motion as being improper at this time.

The Court: Granted.

Bring the jury in.

(Thereupon the jury entered the Courtroom, and the following proceedings were had:)

Mr. Tanksley: State concedes and waives polling.

[fol. 32] Mr. Graves: May it please the Court, the defense concedes the presence of the jury and waives the polling thereof.

The Court: Proceed.

OPENING STATEMENT ON BEHALF OF FLORIDA

Mr. Gold: At this stage of the trial I am going to make what we call an opening statement in which I will first read to you the Information, which is the vehicle by which the defendants are charged and brought before the Court for trial, and then I will briefly tell you what the State expects to prove in their case. After I am through making my opening statement, Mr. Graves, if he desires, can tell you what he expects the case to bring out.

"In the Criminal Court of Record in and for Dade County, Florida, February term 1962, State of Florida vs. Connie Hoffman, also known as Connie Gonzalez and Dewey McLaughlin, Information for A Negro Man and White Woman Habitually Occupying the Same Room.

"In the Name and by the Authority of the State of Florida, Richard E. Gerstein, State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida in the County of Dade under oath Information makes that Connie Hoffman, also known as Connie [fol. 33] Gonzalez, and Dewey McLaughlin, on 23 February, 1962 in the county and state aforesaid, the said Dewey McLaughlin being a Negro man and the said Connie Hoffman, also known as Connie Gonzalez, being a white woman, who were not married to each other, did habitually live in and

occupy in the nighttime the same room in violation of 798.05, Florida Statutes."

The State expects to call various witnesses. We will call a witness who was the owner of the premises where the defendants resided and she will testify about their residing there. She will also testify about various conversations she had with one of the defendants and then we will call the policeman who investigated the situation and made the arrest. Also they will testify about various conversations that the defendants had with them.

Then we expect to call other witnesses from the Miami Beach police department who will testify about various instruments and documents which the defendants were familiar with and presented with which will indicate certain facts, and then we expect to hear testimony from a witness who is connected with the State Department of Public Welfare and she will testify as to her knowledge of the case and also as to various conversations she had [fol. 34] with the defendant Connie Hoffman, and that is briefly what the State expects to prove.

Now Mr. Graves, if he likes, may make an opening statement to you.

OPENING STATEMENT ON BEHALF OF DEFENDANTS

Mr. Graves: May it please the Court, lady and gentlemen of the jury, as you recall yesterday on voir dire, you were repeatedly advised that it is the burden of the State to prove beyond and to the exclusion of every reasonable doubt and to a moral certainty that the defendants are guilty as charged of this particular offense.

There is a presumption that the defendants come to Court with—

Mr. Gold: I object to counsel arguing at this time. He is not going into what he expects to prove. His remarks are improper and not part of an opening statement.

Mr. Graves: I am merely advising the jury as to their position in the case. I just told the jury I was going to tell them what I expect to prove and that is what I am going to tell them now.

The Court: Go ahead.

Mr. Graves: Actually, the defendant doesn't have to prove anything in this case. The burden is on the State to prove that they are guilty as charged and then at the [fol. 35] outset I wish to say that nothing that I say is evidence in this case; certainly nothing that the State Attorney's office says is evidence in this case, nor is the vehicle which he puts before this jury evidence in this case.

All that we request is that you listen very carefully to the testimony as it unfolds in this case and then go into the jury room and make your deliberation based on what you heard.

We have nothing to prove. It is their duty to prove the case. Otherwise we are entitled to a verdict of not guilty.

Thank you very much.

Mr. Gold: The State will call Dora Goodnick.

Mr. Graves: Before this witness takes the stand the defendants request that the Rule be invoked.

The Court: All persons expecting to testify in this case come forward to be sworn.

(Thereupon the witnesses were sworn.)

The Court: All of the witnesses are instructed that while this case is going on, they are not to discuss the case among yourselves nor with anyone else except the [fol. 36] attorneys involved. You will have to remain outside the courtroom and be called in one at a time to testify.

(Thereupon the witnesses retired from the Courtroom.)

Thereupon: DORA GOODNICK was called as a witness by the State of Florida, and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Gold:

Q. Will you tell us your full name and address.

A. Mrs. Dora Goodnick, 732 2nd Street.

Q. That is on Miami Beach?

A. Yes.

Q. Dade County, Florida?

A. Right.

Q. Do you own that premises?

A. Yes.

Q. What kind of a house or premises is that?

A. I got efficiencies.

Q. In other words, you have apartments?

A. Yes.

Q. Do you know Connie Hoffman?

[fol. 37] A. Yes.

Q. Do you see Connie Hoffman in the courtroom?

A. Yes.

Q. Would you point her out.

Mr. Gold: Let the record show the witness has indicated the defendant, Connie Hoffman.

By Mr. Gold:

Q. When was the first time you saw Connie Hoffman?

A. In April, 1961 she came over with a man and she said she wanted to take my apartment.

Q. Is that man here today?

A. No.

Q. Would you describe this man?

A. No, he is not here.

Q. What did this man look like?

A. Tall. He works in the post office.

Q. Who did she tell you this man was?

A. "That is my husband," and she signed in and she took the place.

Q. Do you know what this man's name is?

A. "Hoffman", she said.

Q. What apartment did they move into?

A. Apartment 8.

Q. Do you know the defendant, Dewey McLaughlin?

[fol. 38] A. Right.

Q. Is that him? (Indicating the defendant.)

A. Yes.

Q. When was the first time you saw the defendant Dewey McLaughlin?

A. I saw him December.

Q. Of what year?

A. 1962.

Q. 1961 or 1962?

A. December 1961, I guess.

Q. Where did you see him?

A. First when the weather changed I went out on the street and saw my neighbors was glad to see me and they said, "Mrs. Goodnick, what happened; you letting colored people in your house."

I said—

Mr. Graves: If your Honor please, we object to hearsay testimony.

The Court: Sustained. Don't say what your neighbors told you.

The Witness: Anyway, I went into the house and I said, "Miss Connie, who is that gentleman?" and she said, "That is my husband."

Q. Was this in the month of February, 1962?

A. No. October, and she says, "He is my husband." [fol. 39] I said, "He is your husband? Connie, I want to speak to you; come outside."

She came outside and I said, "Look, Connie, what kind of business is that? You came in with a white husband and now he looks to me like a colored fellow," and she said, "No; he is a Spanish fellow," and so I said, "Anyway, you got to sign in as my husband," and I said, "You have got to sign in husband and wife."

She signed, and then I came the second day, the same day, and I reported to the police. I didn't want I should maybe do something wrong, and I told her, "I want you should move out; I don't want that business."

Q. Did you see Dewey McLaughlin and the defendant Connie Hoffman enter your premises in the month of February, 1962?

A. No. There was a white man there until October.

Q. When did they first move in?

A. Who?

Q. When did you first see Dewey McLaughlin?

A. December.

Q. Did you see him in January?

A. No.

[fol. 40] Q. January, 1962?

A. No. He was a couple weeks. I saw him a couple weeks and I moved him out.

Q. Do you remember which month that they moved out?

A. I think December.

Q. Was that around Christmastime? Were you sick at that time?

A. December they moved out. They didn't move out. She claimed she has got a husband a couple blocks away from me and I went over and was crying to him, "Please move them out."

Mr. Graves: I object to the conversation. I object to conversation between her and another person unless it can be established that either of these defendants was present at the time the conversation took place. I also would like for them to pin down as to what time the conversation took place, should it be admitted.

Mr. Tanksley: There is no reference to any conversation. She hasn't said anything about a conversation.

Mr. Graves: I object to the latter part and move it be stricken.

The Court: Sustained. Granted. The jury will disregard the last few words of the witness.

By Mr. Gold:

Q. Mrs. Goodnick, you stated you first saw— When did Connie move in with this white man?

Mr. Graves: If your Honor please, it is irrelevant and immaterial about Mrs. Hoffman moving in any place with a white man. We are charged specifically with her living with a colored man.

The Court: Overruled.

By Mr. Gold:

Q. Try and think back and recollect when the defendant, Connie Hoffman, moved in with a white man who she said was her husband.

A. October.

Q. Of what year?

A. 1961.

Q. When did you get sick, Mrs. Goodnick?

A. I got sick in February.

Q. In the month of February. Did you see Mrs. Hoffman or this defendant in the house in February, 1962?

A. Yes.

Mr. Graves: If your Honor please, I hate to keep interrupting, but I would like for him to indicate the defendant by name.

By Mr. Gold:

Q. Defendant Dewey McLaughlin.

[fol. 42] A. Yes.

Q. You saw him there. Was Connie Hoffman also at your place in February of 1962?

A. Yes.

Q. Now, describe in your own words the best you can how many times you saw each of them and what they were doing.

A. I saw Mr. McLaughlin going out in the morning and coming at night.

Mr. Graves: If your Honor please, the question is entirely too general. I would like to know specifically what time she is talking about and what she did at the particular time.

Mr. Gold: We have pinpointed the time to February of 1962. He can cross examine. I am not leading the witness. I asked how many times she saw them or what they did. I think it is a perfectly proper question.

The Court: First, if she can make the time more definite, all right.

Mr. Tanksley: It is to the month, which is February, which is the date in question.

The Court: It is still better to try to get a more accurate date, if you can.

By Mr. Gold:

Q. Do you remember the dates, the actual dates in the [fol. 43] month of February that you saw these defendants?

A. Yes, in the morning about half past seven.

Q. The dates—like either February 1st, 2nd or 3rd. Do you remember those days specifically what dates they are. If you don't you can say so.

A. It was December, I guess, the 20th, the 18th—I don't remember.

Q. You don't remember the date specifically. Tell me exactly what you saw them doing in the month of February 1962.

A. I saw them come out in the morning about seven or half past six with something like dinner he was carrying and I saw him about ten days to come in in the evening to come in the house. Certainly they was living together.

Q. Did you have an occasion in the month of February 1962 to visit the apartment?

A. I visited her and I told her—

Q. Who was in the apartment when you got there?

A. Mr. McLaughlin and Mrs. Connie.

Q. They were both there?

A. Sure.

[fol. 45] Q. Did you see any men's clothing in the apartment?

A. Yes, shirts and pants was hanging. Sometimes he took a shower. I was in the back and he was husband and wife. They was there living, she told me he is a Spanish man and I didn't care and I reported it to the police.

Q. Did you have a conversation with Connie about this?

A. Yes,—“Please move out, move out.”

Q. Why did you tell her to move out?

A. I said I think he is a colored fellow and I don't want it, so she didn't listen and I went to her husband and I begged him and he moved her out December.

Q. Who moved her out?

A. Her husband, December.

Q. You mean Hoffman?

A. Yes.

Q. He moved her clothes out?

A. That's right and I locked the door.

(A book was thereupon marked “State's Exhibit 1-A for Identification”.)

By Mr. Gold:

Q. I show you this book and turning to a specific page, [fol. 46] I ask you what appears on that page.

A. I think Mrs. Connie—

Q. What does it say.

A. "Mrs. Connie Hoffman". I don't know.

Q. You can't read that? Who signed that?

A. Mrs. Connie.

OFFER IN EVIDENCE

Mr. Gold: I will offer this into evidence and state that the exhibit will speak for itself.

Mr. Graves: No objection.

The Court: Admitted in evidence as State's Exhibit 1.

(The book referred to was thereupon marked "State's Exhibit No. 1".)

Mr. Gold: You may inquire.

Cross examination.

By Mr. Graves:

Q. I think you said your name is Mrs. Dora Goodnick?

A. Yes.

Q. How long have you been on Miami Beach?

A. I am here 18 years but I used to live in town. On the Beach I lived 12 years.

Q. Where is your native home?

Mr. Gold: I object to that question. I don't think it [fol. 47] is material where her native home is.

The Court: Overruled.

The Witness: I didn't hear you.

By Mr. Graves:

Q. Where is your native home?

A. On the Beach.

Q. Where were you born?

A. In Europe.

Q. Prior to April 1961 you didn't know anything about Mrs. McLaughlin, did you?

A. I did.

Q. You did?

A. She was living in my house.

Q. Mrs. McLaughlin was living in your house?

A. Yes, but with a white man.

Q. As a matter of fact, you don't know whether they were married or not, do you?

A. She told me this is my husband, "I married him and he is a very nice fellow, and that is my husband." That is what she said.

Q. And then you say this gentleman left?

A. The white one left.

Q. Now, Mrs. Goodnick, how many units are there in the apartment building which you occupy?

A. I got four units and a couple rooms.

Q. A couple rooms to each unit?

[fol. 48] A. No.

Q. How many rooms to the unit?

A. A room and a kitchen. It is a pullmanette.

Q. Do you stay on the premises at all times?

A. Yes, all the time.

Q. Do you have an office there of some kind?

A. No. It isn't such a big business I need an office.

Q. Do you have any employees assisting you in the operation of that apartment?

A. No. I do it myself with my husband.

Q. Do you have occasion to visit the apartments in which your tenants live?

A. When everything is all right and they pay me the rent I don't go in their places.

Q. Do they pay the rent in your apartment or do you go to them to collect the rent.

A. I go and collect the rent. Maybe something is needed to fix, I go in; otherwise, I don't.

Q. During the time in which the defendant Connie Hoffman lived in the apartment which you rented her, the two of you didn't get along very well, did you?

A. Why? We was very good friends. We was friends. The child used to make me nervous sometimes. I told her [fol. 49] I didn't have anything against her, no, sir.

Q. How often did you visit that apartment where Mrs. Hoffman was staying?

A. Not very often. They paid their rent and I didn't bother them and they didn't bother me.

Q. Let's pin it down, Mrs. Goodnick. As close as you can remember, how many times did you have occasion to go to the apartment where Mrs. Hoffman was living.

A. I don't know. When I needed her, I knocked on the door and went in. I didn't count.

Q. There was no necessity, as a matter of fact, for your going up there, was there?

A. No; I didn't have to go there.

Q. You can't recall how many times you saw a man in that apartment, can you?

A. Mr. McLaughlin?

Q. Yes, how many times.

A. I saw him go in and going out for ten or twelve days.

Q. Do you go to bed very early?

A. Yes.

Q. When you go to bed do you frequently get up to stir around during the night or do you sleep through the night [fol. 50] A. I sleep through the night and if I see something, maybe somebody went in this way, I put on my robe and I go and give a look but I don't go in the apartments; no, sir. I don't bother nobody.

Q. As a matter of fact, Mrs. Goodnick, you have never seen Mr. McLaughlin in that apartment after dark, have you?

A. Yes, I did. In the back sometimes I don't go so early. He is washing and taking a shower and I didn't mean—

Q. What time of the evening was that?

A. Eight o'clock, taking a shower.

Q. You don't know whether he left after taking the shower or not, do you?

A. I didn't hear you.

Q. You didn't see him leave that night, did you?

A. No.

Q. As a matter of fact, he might have left right after taking a shower?

A. Maybe.

Q. Can you recall any other occasions on which you saw Mr. McLaughlin in that apartment?

A. The door is with a screen and when I pass by I [fol. 51] heard them talking and everything, sometimes 11 o'clock, sometimes ten. I didn't took attention to that. I know he is husband and wife and they pay me the rent. I didn't bother them.

Q. But you didn't see him leave on either occasion, did you?

A. No, I didn't.

Q. As a matter of fact you don't know whether he left or not on those nights when you saw or heard him at approximately 11 o'clock.

Mr. Gold: It is repetitious.

The Witness: I know he was there a couple nights sleeping. It was early in the morning and he went out and he went in to wash. The door was open. I saw him a couple times, he is in the house and was sleeping. Then she used to call me in and the bed was there and I saw him. I swore, and I saw him there but I couldn't tell every day the two or three weeks he was in my house, but I saw him living there.

By Mr. Graves:

Q. I think on direct examination you testified you saw some men's clothing in the apartment.

A. Yes, his shirts, his pants was hanging. I don't want to say but one time he was drunk, excuse me, and he was all naked without clothes, if you want to know.

[fol. 52] Mr. Graves: I move to strike that answer as being not responsive to anything that was asked on cross examination here. She volunteered that.

Mr. Gold: He asked what he did and she responded.

Mr. Graves: I would like to have the question read back.

(The question was read by the Reporter.)

Mr. Graves: The question referred to clothes, your Honor.

The Court: Overrule the objection. Proceed.

By Mr. Graves:

Q. Mrs. Goodnick, will you please describe the floor plan of the apartment which you rented to Connie Hoffman.

A. What? Explain.

Q. The floor plan, how the rooms were laid out.

A. One room and a kitchen. There is a nice couch and a double bed.

Q. Where is the bathroom in that apartment in relation—

A. The bathroom—

Q. —in relation to the front door.

[fol. 53] A. The front door is there and the back is another door with a screen. I was hanging something in the back and he didn't know I am there and he ran into the toilet so I saw him, but I didn't want to tell that but now if you want I tell you, and that is the truth.

Q. I just asked you where the bathroom is located.

A. Where it is supposed to be.

Q. Can you see into the bathroom from the front door?

A. I could. There is a screen door. I am not lying. I saw it, I saw it.

The Court: Just answer the questions.

The Witness: That is why I moved her out.

The Court: Just answer the questions.

By Mr. Graves:

Q. Is there a shower curtain in that bathroom?

A. Yes.

Q. Was it drawn on the occasion when you saw him?

A. He wasn't under the curtains. He went in for water or something. He was naked. That is why I told her, "I don't want you; you can't stay one more minute; I want you to move out."

[fol. 54] Q. How did you happen to get into the apartment when you saw him that day?

A. I didn't go in.

Q. You saw him from the outside of the apartment?

A. Yes. I didn't peek either. I went to hang the wash.

Q. I think you testified that you were sick in February of 1962; is that correct?

A. Yes.

Q. Were you confined to your bed during that time.

A. I was sick and I could not go to hang up something. I was real sick.

Q. You could not move around the apartment house; is that correct?

A. I could not what?

Q. You could not move around the apartment house. Were you sick in bed?

Mr. Gold: Your Honor; she is about to answer and he is cutting her off.

The Court: Were you sick in bed?

The Witness: I was sick in bed. I had arthritis and I had bronchitis. Sometimes I was real sick and sometimes I used to walk over. You wouldn't catch me in a lie and [fol. 55] that is the truth. She knows, also.

The Court: Just answer the questions, please.

By Mr. Graves:

Q. Did you go to a doctor during that time?

A. I went to about six.

Mr. Gold: Your Honor, I object.

The Witness: That's OK.

By Mr. Graves:

Q. Did you go to a hospital?

A. Only to the doctor.

Q. Were you sick in January of 1962?

A. Yes, I was sick.

Q. The same as you were in February, 1962?

A. No. I got better and then I got sick again. He saw I was sick, too, when he came.

Q. Were you also sick in December of 1961?

A. I was sick. I am telling you. Sometimes they gave me every day a needle, seven needles.

Q. It is your testimony you were sick.

A. And I went to the doctor and I went and took care of my place.

Q. You were sick with an arthritic condition in October, November and December of 1961?

A. All winter I was sick. That is a sickness you could [fol. 56] go out, even if you are sick.

Q. Also in January and February of 1962?

A. Yes.

Q. And Mrs. Hoffman moved out in February of 1962?

A. She didn't move out. I called her husband. I didn't see her even then, and her husband came and moved her out. And the same day when he moved out the things she came over to my door with jealousies, you know, and it was open and she came over—"I am going to kill you; I am going to kill you." I closed the windows and I didn't answer her.

Mr. Graves: You may inquire.

Mr. Gold: I have no further questions.

Thereupon: DETECTIVE STANLEY MARCUS was called as a witness by the State of Florida, and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Gold:

Q. Please state your name and official position.

A. Stanley Marcus. I am a detective, Miami Beach Police Department.

[fol. 57] Q. In the course of your official duties, and in your official capacity, did you have an occasion to be involved in an investigation concerning a negro man and a white woman living together on Miami Beach?

A. Yes, sir.

Q. Who were the persons or parties involved?

Mr. Graves: If your Honor please, at this point I would like to interpose an objection and ask that the jury be excused and retire for just a second.

(Thereupon the jury retired from the Courtroom and the following proceedings were had:)

Mr. Graves: May it please the Court, from all appearances, this witness is going to testify about an investigation he made regarding a negro man and a white woman living together and I think at this juncture we should have a ruling as to whether or not this witness, as well as other witnesses who will testify as to whether or not the man appeared to be a negro or whether or not he is a negro within the meaning of the statute and if so, did he investigate him in the light of that fact.

Mr. Tanksley: That is a matter for cross examination. This officer can testify what his investigation was and [fol. 58] counsel can bring out any of that.

Mr. Graves: The word "negro"—

Mr. Tanksley: Excuse me. The question of whether a person is a negro or not is for the jury to determine based on the testimony and the evidence introduced during the case.

Mr. Graves: When he refers to "negro" he is going to create the impression in the minds of the jurors that this is actually a negro, which is not necessarily a fact.

The word "negro" is defined in the statutes of the State of Florida and until such time as it is established that he is a negro within the meaning of the statute, we don't want him referred to as a negro before this jury.

Mr. Gold: That is a question for the jury to determine. That is their province.

The Court: I think so. I think on cross examination of these witnesses you will be able to bring that out but I think it is going to be up to the jury.

Mr. Graves: Is your Honor's ruling that before it is established he is a negro according to the law of the State of Florida you are going to let him testify that he thought he was a negro?

[fol. 59] I might let him testify about someone appearing to be a negro.

Mr. Gold: This is a question of fact, your Honor.

Mr. Graves: It is a mixed question of law and fact, your Honor.

The Court: Actually, it is irrelevant what his investigation was about. It is what he did, not as to his investiga-

tion. It borders on hearsay. It is what he did, rather than the results of his investigation.

Mr. Gold: I will rephrase my question then, your Honor.

(Thereupon the jury returned to the Courtroom and the following proceedings were had:)

Mr. Gold: State concedes, waives polling.

Mr. Graves: Defendant waives polling.

By Mr. Gold:

Q. Detective Marcus in the course of your official duties, did you have occasion to come in contact with one Dewey McLaughlin?

A. Yes.

Q. Do you see that person in the courtroom today?

A. Yes (Indicating Dewey McLaughlin).

[fol. 60] Q. Did you also have occasion in the course of your official duties to come in contact with one Connie Hoffman, also known as Connie Gonzalez?

A. Yes.

Q. Do you see that person in the courtroom?

A. Yes (Indicating Connie Hoffman).

Q. On what date did you first come in contact with these defendants?

A. That would be February 23, 1962.

Q. Tell me exactly what you did and what occurred?

A. On that date at 7:15 P.M. Detective Valeriani and myself went to 732 2nd Street.

Q. Is that the premises owned by Dora Goodnick?

A. Yes. We observed Mrs. Goodnick at the front of her apartment building at that location. I asked her if a Connie Hoffman did in fact live in one of the apartments.

Mr. Graves: Your Honor—

The Court: Sustained. Don't tell what she said.

By Mr. Gold:

Q. Pursuant to that conversation, what did you do?

A. Went to Apartment 8.

[fol. 61] Q. Will you describe the premises where Apartment 8 is. What kind of premises is that?

A. It is apparently a small cottage or bungalow located to the rear of 732 2nd Street.

Q. All part of the same premises?

A. Yes.

Q. On ground level?

A. Yes.

Mr. Graves: I object to counsel leading the witness.

The Court: Sustained.

By Mr. Gold:

Q. Describe exactly the position of Apartment 8 in reference to the surrounding area.

A. Apartment 8 is located directly to the rear of the building at 732 2nd Street. There is a short walkway. In order to get to Apartment 8 you would necessarily walk south from the front of 732 2nd Street and you would come directly upon Apartment 8.

Q. Tell us whether or not Apartment 8 is on the ground or up two stories or what.

A. It is on the ground floor.

Q. Tell me exactly what happened as you approached the apartment.

A. When Detective Valeriana and I approached the [fol. 62] apartment I knocked on the front door. A male voice was heard to call out, "Come in, Connie." I knocked again and a voice again replied, "Who it is?" and at that point I identified myself.

Q. Was this in English or Spanish?

A. It was in English. At that point I identified myself as a police officer employed by the City of Miami Beach. With that we had silence for a moment. Again I knocked and the answers forthcoming were in Spanish.

Q. Do you understand Spanish?

A. I do not, and I again knocked on the door. I knocked four or five times and I said, "Is anyone in there; will you please answer the door," and the answers were again forthcoming in Spanish.

Q. Does Detective Valeriani speak Spanish?

A. Yes. At that point Detective Valeriani went around to the rear door of Apartment 8. A few minutes later I

heard Detective Valeriani inside of Apartment 8 talking to Dewey McLaughlin. Detective Valeriani opened the front door of Apartment 8 and admitted me.

Q. What did you find when you came in.

Mr. Graves: Just a minute. I would like to ask a few preliminary questions to see whether or not this evidence which he is about to present to this jury and this [fol. 63] court should be suppressed.

Mr. Gold: We haven't offered any physical evidence.

Mr. Graves: Testimony is the same.

Mr. Gold: Testimony is not evidence.

The Court: Unless there is some physical evidence involved.

Mr. Graves: As to what he saw on the premises, if he legally entered your Honor—

Mr. Gold: If there is going to be any further argument—

The Court: Take the jury out.

(Thereupon the jury retired from the Courtroom, and the following proceedings were had:)

The Court: Before you do anything on that question, you are going to have to establish the right of McLaughlin to be there, his proprietary right. Otherwise, he can't question any search, seizure or illegal entry, at any rate.

Mr. Graves: There is testimony before the Court that Connie Hoffman—

Mr. Gold: She wasn't there.

Mr. Graves: She lived there; she is a defendant and is entitled to the benefits of the law on search and seizure. [fol. 64] She lived there. There is no question about it according to the testimony up to this point.

Mr. Gold: If you want to put him on the stand and say he lived there—

Mr. Graves: I don't have to do that. We are trying Connie Hoffman, as well as Dewey McLaughlin.

Mr. Gold: Your Honor, first of all, I would say this: He has to establish proprietary interest in the premises and two, even if he could, I don't believe that the laws in reference to legal search and seizure— We haven't introduced any physical evidence in the case as a result of him going to the apartment.

I am not agreeing that they entered illegally. And third, that is not the redress. Counsel knows if he feels they entered the apartment illegally he can file a civil suit if he wants.

Mr. Graves: That is quite possible.

Mr. Gold: As far as this proceeding, there is no basis at all for this objection, if your Honor please.

Mr. Graves: If your Honor please, there has been no testimony so far showing that this man went there armed [fol. 65] with a search warrant or that he had reason to believe a felony was being committed.

Mr. Gold: First you said you wanted to ask some questions.

Mr. Graves: Yes.

Mr. Gold: I would like a ruling from the Court whether or not he is in a position legally at this time to ask the questions in reference to search and seizure.

The Court: I will take it under advisement. The jury isn't here, so nothing can be harmed.

Examination.

By Mr. Graves:

Q. Officer Marcus, on February 23, 1962, when you went to the premises commonly known as 732 Northwest 2nd Street, were you armed with a search warrant authorizing you to search those premises?

A. What is the address?

Q. 732 NW 2nd Street—I think that is the address commonly.

A. No.

Q. What address did you have?

A. 732 2nd Street.

Q. Do you recall the question?

A. Yes; you asked if I had a search warrant.

Q. Yes. Did you?

[fol. 66] A. No, sir.

Q. In order to get to these premises which you have described on the back of the property, you had to go through private property, didn't you?

A. That's right.

Q. There is a walkway that leads from the street to that cottage; is that right?

A. That's correct.

Q. Do you know who lives in that apartment or who used to live in that apartment on the date in question, February 23, 1962?

A. I believe I do.

Q. Who.

A. Connie Hoffman.

Q. Is that the same Connie Hoffman on trial here?

A. Yes, sir.

Q. I think you said Officer Valeriana was with you. Did he have a search warrant?

A. No, sir.

Q. And he had to go the same way that you did to get back to the cottage?

A. That's right.

Mr. Graves: No further questions.

Examination.

By Mr. Gold:

[fol. 67] Q. Why did you go to the premises in the first place?

A. We were conducting an investigation pertinent to a possible contributing to the dependency of a minor case.

Q. What was this based upon?

A. Information received by the commanding officer of the juvenile aid bureau.

Mr. Gold: I have no further questions.

By the Court:

Q. Do you know of your own knowledge how Detective Valeriani got into the apartment?

A. Yes, sir.

Q. How? When I say of your own knowledge—

A. It was nothing I saw, your Honor.

Q. You don't know how he got in, whether anyone let him in.

A. Anything I would say would be hearsay, I am afraid.

Q. Actually at this point there is nothing to indicate that entry was illegal.

Mr. Gold: I further say that I don't think he could show proprietary interest in the premises.

The Court: He says the other defendant could.

[fol. 68] Mr. Gold: But she wasn't there at the time.

Mr. Graves: That makes the cheese more binding, if she were not there.

The Court: At any rate, the Court will be in recess for ten minutes.

(Thereupon a short recess was taken, after which the witness resumed the stand and the following proceedings were had out of the presence of the jury.)

By Mr. Gold:

Q. Detective Marcus, it is my understanding that when you got into the apartment, Detective Valeriani and the defendant McLaughlin were already there?

A. That's correct.

Mr. Gold: For this purpose then, I think we ought to call Detective Valeriani.

The Court: All right.

Thereupon: NICHOLAS VALERIANI was called as a witness by the State of Florida, and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Gold:

[fol. 69] Q. State your name and official position.

A. Detective Nicholas Valeriani, Police Department City of Miami Beach.

Q. Were you with Detective Marcus on the 23rd day of February when you arrived at the premises at 732 2nd Street, Miami Beach?

A. Yes.

Q. Did you approach Apartment 8?

A. Yes, we did.

Q. Tell me exactly what happened.

A. We arrived at the apartment, looked for Mrs. Connie Hoffman. She was not in the apartment when we arrived. We knocked on the door and a male voice answered, "Connie? Come in," and right off we didn't do anything further. We just knocked again, and the male voice asked who was there and Detective Marcus stated "Police" and then we heard some— We could not make out what was being said but I recognized that it was in Spanish.

Q. Do you understand Spanish?

A. Yes, I do, and nothing else was said except this talking and there could be heard some rustling and noise in the rear of this apartment. There was quite a delay.

At this point I became suspicious that the party might be going out the back door.

[fol. 70] We passed Mrs. Goodnick—rather, I did—as I went around and I said, "Is there a back way?" and she said "Yes" and motioned toward the rear.

Q. Mrs. Goodnick gave you permission to go up there?

A. Yes. I went to the rear and as I was approaching, as I turned around to go to the rear or the other exit on Apartment 8 I saw this colored male come out this door.

Q. He opened the door?

A. Yes. He opened the door and came outside and I confronted him at this point and identified myself to him.

Q. Exactly what happened then? Was this conversation in English or Spanish?

A. It started out to be in Spanish and as I asked him for identification in Spanish it was obvious he understood English, so it was all in English then.

Q. Did he show you identification?

A. Yes. He produced— The main thing I recognized was an ID card.

Q. Describe the ID card.

Mr. Graves: I object to the description of the ID card on the ground that the best evidence would be the card itself.

[fol. 71] Mr. Gold: Your Honor, we are going into this solely for the purpose of determining in reference to the arrest. The jury is not present, so I don't think it makes much difference what comes out at this point.

Mr. Graves: Even on a special inquiry as to whether or not the evidence should be suppressed, your Honor, in my opinion of the law, it is that the rules of evidence still apply.

The best evidence rules would foreclose any testimony as to what was on the card, inasmuch as the card itself would be the best evidence.

The Court: Those rules of evidence don't apply on legal questions of search and seizure and arrest. Probable cause comes in here, too, so that even hearsay evidence and the best evidence rule does not apply.

By Mr. Gold:

Q. What kind of card was this?

A. It is procedural with anybody we have knowledge of working on the Beach or residing on the Beach and having employment there, that the first identification required or asked of is a civilian registration card.

Q. Is that an ordinance of the City of Miami Beach?

[fol. 72] A. Yes. There is an ordinance requiring anybody who is employed in any work dealing with the public to have this civilian registration card.

Q. Did he show you the card?

A. Yes, he did and I noticed the date of registration was January 12, 1961 and I knew that he was still employed and he stated he was still working in the hotel on the Beach.

Q. That was on February 23rd?

A. Yes, so I knew that— These cards run for a year period so that this card had to have expired and he had not renewed it, but it showed information on it regarding his status.

Q. And then you went into the apartment?

A. Yes, sir. He and I walked in and at that point Detective Marcus was also coming around and we all three entered the apartment and we asked him if Connie Hoffman was there and he said she was outside looking for the boy.

Q. Did you place him under arrest on any charge?

A. Yes, sir. Upon asking him again for certain information that he was working at a hotel and seeing that the police card had expired, we arrested him for failure to [fol. 73] make civilian registration.

Q. You observed this from the card when you were outside the premises?

A. Yes.

Q. And then you went into the apartment?

A. Yes, sir. He and I walked in.

Q. Did he make any statements to you?

A. He was fairly cooperative. He was hesitant at first. There were some questions that he stammered on and made off like he didn't want to answer and he was fairly cooperative and he came forth with the statements regarding the period of time that he was living in this room with—

Q. All the statements made by him were given freely and voluntarily?

A. Yes.

Q. There was no promise of reward or threat of punishment of any sort?

A. No.

Mr. Gold: You may inquire.

Cross examination.

By Mr. Graves:

Q. I will try hard this time Officer Valeriani—is that it?

A. Thank you, sir.

[fol. 74] Q. When you went to the back of the apartment and announced your presence— You did that, is that correct?

A. I had my identification prepared, yes.

Q. The door was not open?

A. Yes. He had come out the door and came into my arms. I was just turning the corner of this bungalow when he came at me and was already out the door. He was in the process of shutting the door as he was out.

Q. How did you happen to get into the apartment?

A. We walked in with him from this back door.

Q. Was it at his invitation or at your request?

A. At our request. He didn't offer any type of refusal of entrance. We told him we were looking for Connie Hoffman.

Q. Did you tell him you were there investigating him?

A. Not at this point. This brought in other circumstances because we had information—

Q. Specifically what did you say your business was there? [fol. 75] A. What do you mean by that?

Q. What did you tell him your business was on the premises at that time?

The Court: Your question is what he told him his business was.

The Witness: We were inquiring as to—first of all, we were looking for Connie Hoffman pertaining to a child that we had information that was being neglected and was lacking in supervision and we had information and had observed for some time and it was on that basis that we were sent over by our supervisor so it was, her we were primarily interested in finding, and we had information she was living and residing in Apartment 8.

Q. Officer Marcus was with you, wasn't he?

A. Yes.

Q. Do you know what his business on the premises was at that time?

A. We were assigned there together.

Mr. Graves: I have no further questions.

Redirect examination.

By Mr. Gold:

Q. Did you ever see the child?

[fol. 76] A. Later on that evening we had it located and we had to do further investigation after we had both parties at the station.

Mr. Gold: That's all.

The Court: At this point it does not appear that there was any evidence observed or secured inside the apartment as far as I can tell.

Mr. Graves: Your Honor, may I anticipate? Suppose there is testimony forthcoming. While the jury is out we might as well settle that question.

The Court: Yes. Settle it as much as you can at one time when the jury is out.

Mr. Graves: It appears that these officers went on the premises for the purpose of investigating delinquency or dependency of a child and the defendant Dewey McLaughlin admitted them. Now, if he knowingly admitted them for that purpose, anything else they saw on the premises not related to the child should be excluded, your Honor, under the law of illegal search and seizure.

The Court: Let's ask him. I don't know whether they saw anything.

Mr. Graves: I want to anticipate, instead of sending the jury out two or three times.

[fol. 77] The Court: After you got into the apartment what, if anything, did you see connected with this case?

The Witness: We didn't conduct any search but there were things observable to us, such as two of his shirts that we ascertained if they belonged to him. They were hanging at the foot of this double bed. There was a little sofa and there were two shirts and also part of other apparel of his and we came forth with questions in conversation relative to his period of time there and had the child been kept there and he stated at least on one occasion the child was there while he was sleeping there and he stated—

Mr. Gold: Was he under arrest at that time?

The Witness: Yes, for the civilian registration.

Mr. Gold: First of all, I think we have a legal arrest.

The Court: The whole thing revolves around the other defendant. The Court will have to instruct the jury that anything said by one defendant can't be held against the other.

Mr. Gold: I have some cases here, your Honor, in Florida [fol. 78] cases, which holds the proposition in reference to statements; it doesn't make any difference whether there was an illegal search and seizure.

The Court: I understand that any voluntary statements—

Mr. Tanksley: They would not be binding against her.

The Court: All right. Deny the motion to suppress. Bring the jury in.

(Thereupon the jury returned to the Courtroom, and the following proceedings were had:)

Mr. Gold: State concedes; waives polling.

TESTIMONY OF DETECTIVE STANLEY MARCUS
(RESUMED)—DIRECT

I believe, before the jury was sent out, Detective Marcus, I asked you what did you find when you came in the apartment.

A. I observed Dewey McLaughlin and Detective Valeriani. At that point I interrogated Dewey Martin and I asked him whether he was in fact living in that apartment. All of his answers were in Spanish. I did not understand.

Detective Valeriani began conversing with McLaughlin in Spanish. At that point Dewey was suddenly able to [fol. 79] answer any questions in English, so that I could understand him. I asked him if in fact he was living in that apartment and he said he had been living there approximately two weeks.

I asked him if he was living there with Connie Hoffman and he said yes, she was living there with him for the past two weeks, and he also said that prior to that they had been living together in the City of Miami for a period beginning sometime late in December of 1961.

The Court: Members of the jury, at this time the Court instructs you that any statements or admissions made by one defendant in this case, Defendant McLaughlin at this point, cannot be held against the other defendant Connie Hoffman, who was not present at the time.

Proceed.

The Witness: I observed two shirts hanging on the door of what seemed to be a portable closet. I asked Dewey McLaughlin if those shirts were, in fact, his, and he said they were. He had two shirts hanging there. I inquired as to his employment and he said he had been employed in a hotel on Miami Beach. I asked Dewey McLaughlin if he had had relations with Connie Hoffman—

[fol. 80] Q. What kind of relations?

A. Sexual relations.

Mr. Graves: If your Honor please, we object to the question regarding sexual relations as being irrelevant and immaterial to the issue. The question is solely whether they occupied a bedroom.

The Court: It might be evidence in that respect. Overruled.

The Witness: McLaughlin stated to me that at least on one occasion he had sexual relations with Connie Hoffman. I pointed to a double bed that was in the room and asked him if he, in fact, slept on that double bed with Connie Hoffman and he replied that he did sleep in that double bed with Connie Hoffman.

By Mr. Gold:

Q. Let me ask you this: Describe the room.

A. To my recollection, it was what might be considered an efficiency apartment. There is a double bed. There is also what might be a fold-out sofa bed and a small kitchenette-type arrangement.

Q. And a bathroom?

A. Yes. I didn't go into the bathroom, and I will have to assume there is a bathroom.

Q. After your conversation about sleeping in the bed, [fol. 81] what transpired?

A. I asked him if at any time the five-year old son of Connie Hoffman had slept in the room while he and Connie Hoffman occupied the double bed and he replied that on at least one occasion the boy, Ralph Gonzalez, age 5, had slept on that sofa bed while he and Connie Hoffman occupied the double bed.

Detective Valeriani and I transported Dewey McLaughlin to police headquarters, which is about a block away from the 732 2nd Street address.

On the way down to the police station, Valeriani and myself observed Connie Hoffman walking. I believe she was walking north on Meridian Avenue toward her apartment and she saw Dewey McLaughlin in the police car.

Q. Was this a regular marked police car?

A. No; this is an unmarked car. She observed Dewey McLaughlin in our car and called out something to this

effect, "What is the trouble?" and Detective Valeriani asked her if she would come down to the police station, to the Juvenile Aid Bureau and she said she would and Valeriani and I continued on to the police station.

Q. Did she go in the police car with you?

A. No; she did not. Sometime later, 10 or 15 minutes [fol. 82] passed and Connie Hoffman appeared in the Juvenile Aid Bureau and at that time we asked her certain questions concerning the fact that a Negro male was living with her.

Q. Was the defendant Dewey McLaughlin present at that time?

A. Yes, he was, and Connie Hoffman replied yes, she was living with a negro and what was wrong with it, and "I don't know of any law prohibiting me from living with a negro man. That is all I have to state."

Q. Then what happened?

A. Detective Valeriani questioned the couple further.

Q. Were you present at the time of that conversation?

A. I believe I walked out of the office at that time.

Mr. Gold: You may inquire.

Cross examination.

By Mr. Graves:

Q. Officer Marcus, where did you get your original lead regarding the dependency of the child of Connie Hoffman?

A. My original lead came from Lt. Farrell, who is in [fol. 83] charge of the Juvenile Aid Bureau.

Q. What part, if any, did Dora Goodnick play in this so far as initiating this proceeding that you are talking about?

A. I received the original information from Lt. Farrell. Other than that, I couldn't answer that type question.

Q. You didn't ask Mr. McLaughlin anything about the child, did you?

A. Yes, sir.

Q. What did you ask him?

A. I asked him if the child, Ralph Gonzalez, had ever slept in that sofa bed.

Q. Is that all?

A. Concerning the child?

Q. Yes.

A. To my recollection, yes.

Q. Then isn't it a fact that you initiated a proceeding in the Miami Beach Municipal Court regarding this dependency of the child?

A. That's correct.

Q. You testified in that case?

A. No, I did not.

Q. Do you know the outcome of that trial?

[fol. 84] Mr. Gold: We object. It has no bearing on this charge.

The Court: Sustained.

By Mr. Graves:

Q. Mr. Marcus, on cross examination, did I understand you in response to my question as to whether or not you testified in Miami Beach Municipal Court, that you said you did not testify.

A. With regard to what case.

Q. Regarding the cases of the dependency of the minor child, that is to say Connie Hoffman's son.

A. To my recollection, I don't recall having testified.

Q. If you were there, you would know, wouldn't you? This hasn't been very long ago, officer.

A. To my recollection, I did not testify.

Q. Well now, do you recall testifying in Juvenile Court.

A. No; I did not testify in Juvenile Court.

Mr. Graves: I have no further questions.

Mr. Gold: Nothing further.

The Court: Call your next witness.

[fol. 85] Thereupon: NICHOLAS VALERIANI was called as a witness by the State of Florida, and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Gold:

Q. State your name and official position.

A. Nicholas Valeriani, Detective, Department of Police, City of Miami Beach.

Q. Do you know the defendant, Dewey McLaughlin?

A. Yes.

Q. Point him out please.

A. Right there. (Indicating Dewey McLaughlin.)

Q. Do you know the defendant, Connie Hoffman, also known as Connie Gonzalez?

A. Yes.

Q. Do you see her in the courtroom today?

A. Seated to his left. (Indicating Connie Gonzalez.)

Q. When and where did you first come in contact with the defendant.

A. I had seen the defendant Connie Hoffman in the past [fol. 86] in the vicinity of the 1st Street area, but as to the charge here in place I had cause to investigate a condition relative to information that we had had a Negro and a white woman living together with the added information that a child was being neglected. It was, to our information, in her custody.

Q. As a result of this information, what did you do, if anything?

A. October 23rd of — Rather, on February 23, 1962 we had occasion—we were told by our supervisor to go to Apartment 8 at this address and inquire into the condition of the child relative to the lack of supervision and the neglect that was being accorded this child and to talk with Connie Hoffman about it and to place any charges that would be necessary because of these conditions existing that had taken place.

Q. What did you find when you came to the premises?

A. When we went to the premises we knocked on the door at Apartment 8. At that point, as Detective Marcus

knocked, we heard a male voice say, "Connie, come in." We didn't answer anything right away and we knocked again and then he said, "Who is there?" Detective Marcus stated "Police."

[fol. 87] At that point it was quiet for a while and then we heard some talking that appeared to be in Spanish and there was quite an interim there. There was quite a bit of time elapsed and nothing was happening.

We did hear some rustling in the back of this room. Because of the delay in hearing this noise and the back of the room, I went around the back. I was guided there by Mrs. Goodnick. I asked if there was a back way and she pointed that direction to me and as I turned the corner of this bungalow-type structure, I saw this colored male come out from what was another exit, a rear door of this apartment.

Q. Who was that?

A. Dewey McLaughlin who identified himself. I identified myself also. He had come out the door. I had my identification ready. I told him I was a police officer and showed him my identification and, thinking back to it, he did take a second look at my identification and I showed it to him real close.

I asked him for identification and he produced some papers one of which was an ID card or what we call a civilian registration card.

Q. What purpose does that show?

A. Because of the fact that there is a city ordinance in [fol. 88] the city of Miami Beach requiring almost anybody who deals in any type work dealing with the public, they are required to register with the Chief of Police within 48 hours, giving their address and place of employment, et cetera, and so that is mainly what we look for.

Q. Where was Dewey McLaughlin employed?

A. He was employed at the Cavalier Hotel at 1320 Ocean Drive.

Q. On the Beach?

A. That is not what was stated on that police card and I noticed right off, of course, that the police card read "Expiration Date." He had registered January 12, 1961 and this was February 23, 1962 and having information he was still working there and through his admissions that he was working at a different hotel now, we used that information.

Cognizant of these other circumstances of their living together and this child being in utter neglect for a lengthy period of time, using that information we arrested him at the scene at that time after he walked in with us. We went in and we had some information relative to his status there.

Q. What did you arrest him for?

A. Failure to make civilian registration.

[fol. 89] Q. When you went back into the apartment, what happened then?

A. We questioned him as to his period of living in this apartment with Connie Hoffman and he stated about two weeks. He was rather hesitant on some of the answers and he was fairly clear on most of them. We took notice of a couple shirts that he admitted to owning that were hanging up at the foot of this double bed that was in this apartment and that he stated were his. One of them was part of a uniform from Nassau, I believe, or Bahamian, whatever country he came from. It was part of his uniform and was hanging up and most of the questioning wasn't too lengthy in this about the relationship and his status with Connie Hoffman and the child.

Q. Tell us what was said.

A. Detective Marcus asked how long he had been living there. He said about two weeks.

Mr. Graves: Pardon me. Your Honor please, we should like for you to instruct the jury again.

The Court: Yes. Members of the jury, you are again reminded that you are instructed to ignore anything said by one defendant in the way of admissions or otherwise; [fol. 90] that you are to disregard those statements as to the defendant Connie Hoffman who was not there and had nothing to do with the conversation.

By Mr. Gold:

Q. All right. What language was the conversation had in?

A. He started talking in Spanish. Since I have knowledge of the Spanish language—

Q. Do you speak fluently?

A. Rather fluently and I understand fluently and I speak well and read very well, in Spanish, having an Italian back-

ground and having taken police conversational Spanish and I get to interpret occasionally, so when he saw I couldn't understand him and make myself clear in Spanish, he started making statements, understood and speaking in English, as far as answering my questions.

Q. Relate the conversation you heard between the defendant and Detective Marcus.

A. Detective Marcus asked him if he had been living in this apartment for what period of time and he thought, and he said, "About two weeks," and Mr. Marcus asked if he had sexual relations with the woman, and that, he had trouble. You could see he was very hesitant, hesitated, and finally it was gotten across that he understood and that they were sleeping in the bed and that they had been for [fol. 91] that period of time and I asked him also if the child was ever present.

There was this double bed and at the foot of the double bed with a little space there was a small couch set up and Mr. McLaughlin at that point related that on at least one occasion this five-year old had been in there while they were in the course of spending the evening there.

He was asked where he worked and he related he was working there now, doing a porter's job. We asked about his uniform and he said he had been in the Nassau military and he did come up with the fact that he was not in the Nassau military any more but that he had been, and with that brief conversation he was placed under arrest for failure to make civilian re-registration and the fact that he was working at another hotel.

We were going to bring him to the station and as we headed toward the station south on Meridian Avenue, we saw Connie Hoffman walking north, heading toward her apartment.

At that point she hollered, calling him Marcus. She said, "Where are you going?" and we told her he was under arrest and being brought to the station and she was told [fol. 92] if she could come down there, and she said she would, and she did within minutes, and as we were continuing our questioning of Dewey McLaughlin, she came in in somewhat of a furor and wanted to know what he was doing there.

She was told he was under arrest for failure to make civilian re-registration and we had knowledge that they were living together there and that he had stated that they had been there two weeks and she said, "You tell him the whole truth: It isn't only two weeks," she said, "We have been living together over three months," and said they then had lived in Miami for several months, three months approximately before that.

Q. Both defendants were present at that time?

A. Yes; they were both present with Detective Marcus and myself in this juvenile office and at this point we asked her where the child was, if she had any knowledge where her child was and she said no, and when I questioned her further about that she got very huffy about this Floyd Hoffman who we had information had been living with her prior to this incident, and she blamed him for sending the child over, so to speak, and that the child was staying at his place and that she couldn't control him and he was all-[fol. 93] ways taking off on her—the child, that is—and, of course, we were interested in this information too, because we had seen the child ourselves and he had been observed by the police officers in this alley that the police cars stood on all hours of the day and night and this child was seen as late as 11 o'clock and 12 o'clock at night unattended, unsupervised and running around.

This happened because the party she had been living with before, this Fred Hoffman, worked for a garage that was contracted by the City to tow cars for police violations, so that when Mr. Hoffman would leave this child, he would run out and was on his own for periods of time, so possibly she was believing he was up there when he wasn't; and we found out she had custody of this child so she was questioned further about that and she was placed under arrest for the contributing to the dependency charge.

Q. Then what happened?

A. Detective Marcus appeared at the Municipal Court hearing on the following Monday. This was a Friday evening, and the defendant was found--

Q. Did you have occasion to go back to the defendant's apartment?

[fol. 94] A. Yes. It was on the afternoon of the 28th and we reported for work and Detective Farrell informed us the conditions of their living together was still existing.

Q. Do you know how it was brought to the attention of the police in the first place that they were living together, a Negro man and a white woman living together?

A. Information had been gotten which was received by Lieutenant Farrell in their office.

Q. From Mrs. Goodnick?

A. From Mrs. Goodnick and neighbors, I understand—I was told.

Q. You went back there on the 28th?

A. Yes. Detective Kennedy was sent to the Cavalier Hotel where I had checked at an earlier time in reference to McLaughlin's status and he went and arrested Mr. McLaughlin on this stated charge. That was about 3:10. About 3:30 he returned to the office and we went to Apartment 8, back to the original apartment, and we knocked on the door and Connie Hoffman answered and she stated she was taking a shower so we waited a few minutes and she came to the door clothed and we informed her of the charge and she was not placed under arrest for that charge and she [fol. 95] became very vehement.

Q. What did you tell her she was charged with?

A. Under State statute not permitting a Negro and a white female living together and she said she never heard of any such law; she never heard of any law that a Negro and a white woman couldn't live together and she didn't believe it, and with that charge she with some hesitancy and not feeling too good and being huffy, she did get in the car and accompany us to the station, whereupon she was booked.

As we entered there she spotted Dewey McLaughlin and I overheard her tell him, "He doesn't know a thing, not to say anything, he doesn't understand anything," and at that point Mr. McLaughlin obliged her and couldn't speak English and couldn't understand anything.

Mr. Gold: You may inquire.

Cross examination.

By Mr. Graves:

Q. Officer, I think you testified that you had a conversation with Dewey McLaughlin in Spanish.

A. Yes. It wasn't a conversation. I made a couple inquiries when I started talking Spanish.

[fol. 96] Q. How long have you been familiar with the Spanish language?

A. Several years, approximately six or eight years. Actually much longer than that, but as far as conversational Spanish—

Q. You know conversational Spanish?

A. Yes.

Q. From the subject in Spanish were you able to ascertain possibly what country he came from?

A. He said Honduras. He mentioned Honduras but that was brought out in English.

Q. Did he speak Spanish very fluently?

A. Quite fluently.

Q. Officer, have you talked to anybody this morning regarding your testimony which you were going to give in this court?

A. Yes, the Assistant State Attorney.

Q. Anyone else?

A. Since the rule has been invoked, no, sir.

Q. What prior to the invoking of the rule?

A. Before we came to the courtroom.

Q. Who did you discuss it with?

A. There wasn't any discussion on it. There was mention of the case.

[fol. 97] Q. Did you talk to Mr. Marcus?

A. No, not since the rule has been invoked.

Q. What about before, though. You came over together this morning, didn't you?

A. No, we did not. I am on duty and Detective Marcus came over from home.

Q. You have been working for several years with the Miami Beach Police Department, have you not?

A. Yes; it will be eight years in December.

Q. And during that eight years you have become quite familiar with Fred Hoffman, haven't you?

A. No, sir; I have not. Some individuals, it is true, in the department have, but I have not had occasion to become familiar with him.

Q. Fred Hoffman has some connection with the Miami Beach Police Department, doesn't he?

Mr. Gold: I object your Honor. I don't see the materiality.

The Court: Overruled.

The Witness: He is one of the garages that is contracted by the city to tow in vehicles.

Q. And he works on the premises of the Miami Beach [fol. 98] police department, doesn't he?

A. No.

Q. He never comes over there?

A. He comes over there— I am not too familiar with the procedure but having learned this from when I worked as desk officer, I know that they come over there with some kind of a turn-in sheet verifying that they have the vehicle in custody to be impounded, and that is brought to the desk and then they leave.

Q. On the night in question when this arrest was made, isn't it a fact that after you inquired as to where Connie Hoffman's child was that Fred Hoffman brought the child to the police station; isn't that a fact?

A. Yes, sir. He located the child.

Q. Did you ask him where the child was all the time.

A. Yes.

Q. And what did he say?

A. He didn't know. He thought he had him and he didn't have him, and it was on my inquiry and my demand for the child that Fred Hoffman brought him in. He had told me he had been out on a call and I had left word for him as soon as he located the child to bring him to the juvenile [fol. 99] bureau office.

Q. After this juvenile case— After the arrest in this juvenile case, a hearing was had in the City of Miami Beach Municipal Court; is that correct?

A. I was not there but I believe it would have been held on the following morning.

Mr. Gold: I object to any further questions about the hearing. The officer said he wasn't there, so it isn't material.

The Court: Sustained.

By Mr. Graves:

Q. On your direct examination, didn't you testify that Officer Marcus was there?

Mr. Gold: I object, because he wouldn't know of his own knowledge.

Mr. Graves: He testified on direct examination that Officer Marcus was there, which indicates—

The Court: Overrule the objection.

The Witness: He was to represent the City of Miami Beach in that case because he was on duty at that time.

By Mr. Graves:

Q. And the city was represented?

[fol. 100] A. By Detective Marcus, if no one else. To my knowledge he appeared there.

Q. Have you ever studied law, officer?

Mr. Gold: I object to that question, your Honor. I don't think that is material.

The Court: Sustained.

By Mr. Graves:

Q. On several occasions officer, you have alluded to a colored male or Negro male in your direct examination.

A. Yes.

Q. I ask you, do you know what a Negro male is.

A. I believe I have inquired and have had conversations and have been approached—

Q. What is it?

A. I go by the presence, the physical presence and certain features that are predominant that I feel and believe are predominant in colored males.

Q. Any other criteria?

A. I never had any occasion to have any special feelings about it in any way.

Q. You have alluded in your direct examination to a white woman and I ask you what is a white woman?

A. From the many personal observations and experiences [fol. 101] I would say that Connie Hoffman is a white woman.

Q. I just asked you what does the term "white woman" mean. I didn't ask about Connie Hoffman.

A. A person who is light in color of skin.

Q. Hair and eyes?

A. Hair and eyes.

Q. You are familiar with the so-called mixed breeds, aren't you—that is, people who would defy the definition you gave of white and colored.

A. I wouldn't set myself up as an expert. I am of a class of society who can make certain opinions or make statements relating to what, my beliefs are, what we can interpret as a general rule.

Q. All told, how many charges did you prefer against Connie Hoffman and Dewey McLaughlin?

A. Detective Marcus instituted the charges.

Q. How many charges were preferred?

Mr. Gold: It is immaterial to this case, your Honor. There is only one case before this Court.

The Court: Overruled.

By Mr. Graves:

Q. My question is, all together to your knowledge how many charges have been preferred against Connie Hoffman [fol. 102] and Dewey McLaughlin.

A. To my knowledge, on February 23 she was placed under arrest for contributing to the dependency or delinquency of a minor.

Q. Who made that arrest?

A. Detective Marcus.

Q. Detective Marcus was working for the Miami Beach Police Department at that time, was he not?

A. Yes.

Q. What other charges?

A. At that point, that was it. On the 28th she was placed under arrest for living with a Negro male.

Q. A proceeding was initiated in another Court regarding the child, was it not, to which you testified.

A. I was sent over to testify, yes.

Q. Could there be a relationship between all these charges as far as your feelings toward the defendant.

Mr. Gold: I object to that question, your Honor.

The Court: Sustained.

Mr. Graves: You may inquire.

[fol. 103] Cross examination.

By Mr. Gold:

Q. Detective, in the course of your lifetime you have had occasion to associate with many people of different races, Negro and white?

A. Yes.

Q. Would you state to the Court and jury your opinion as to what the race of Dewey McLaughlin is?

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Graves: I object to the question unless it can be established he is qualified to do so.

By Mr. Gold:

Q. First of all it was opened up on cross examination by defense counsel. Second, the State argues it is solely a question of fact and any person can be in a position to give an opinion as to what he feels and it is up to the jury to determine the weight and the whole question of fact in this case. It is a question of fact, not a question of law.

Mr. Graves: If there is going to be full argument, we would like to have the jury excused.

The Court: Yes. As a matter of fact, let's send the jury out to lunch.

Members of the jury, we are going to recess as far as you are concerned until 2 o'clock.

[fol. 104] You will go your own way for lunch, as you please, but if any of you happen to see each other during the lunch hour, you have the same instruction you have been given previously. Don't discuss the case among yourselves or with anyone else or allow it to be discussed in your presence.

You may leave now and come back at 2 o'clock, and make sure you do leave and don't come into the courtroom while we are discussing these legal matters.

(Thereupon the jury retired from the Courtroom, and the following proceedings were had:)

Mr. Graves: Shall we proceed with argument, your Honor?

The Court: Go ahead.

Mr. Graves: If your Honor please, this Statute under which this charge is brought 798.05 is to be construed in light of the definition set forth in Section 1.01, sub-section 6 of the Florida Code which defines the term "Negro: Colored person, mulatto or persons of color."

The Statute says this, your Honor, and I think it is controlling in this case, too: That the words "Negro, colored, [fol. 105] colored person, mulatto, or persons of color when applied to persons include every person having one/eighth or more of African or Negro blood."

I think we are bound by the definition of Negro in Section 1.01. If the State is not prepared to prove a percentage of blood in keeping with the Statute, then I think we even at this juncture are entitled to a directed verdict.

This gentleman has testified as to what he thinks a colored person is and what he thinks a white person is. There are plenty of people who look like they belong to another race. I myself might be a white man as far as this is concerned because nobody has tested my blood and even if they did they couldn't find any Negro blood because there is no such thing.

We have argued this statute is indefinite and vague, but I see no test set forth that the jury can use to set forth whether one of these persons is white and one colored unless some person testifies they tested the blood of each of

them and found eight per cent colored blood in one and $\frac{7}{8}$ ths per cent is white in the other.

The Court: The last time I declared a Statute unconstitutional and indefinite they reversed me and said anybody with common sense would know, and I am afraid that is the way that is going to be, especially when another Judge has already ruled that it is constitutional and definite enough. I will have to take the same attitude and think about common sense.

I think if someone is charged with stealing an automobile, I think people can come in and say something was an automobile by looking at it, and I am going to have to do the same thing in this case.

Mr. Graves: In the case which you just put, regarding an automobile, the term should be—the term “automobile” is one which is used in common parlance and everyone has some understanding of what an automobile is, but here we have the statutory definition and it says in construing any of the statutes of the State of Florida that this term shall be applied in this way.

The Court: That's right.

Mr. Graves: If it can't be shown there is such a thing as Negro blood or white blood, there is no test that the jury can apply in making a finding of fact and therefore, the statute is vague, inasmuch as a reasonable man couldn't [fol. 107] possibly as being a prudent person come up and say, “My course of conduct should be A or B.”

The Court: I think you are reading something into that definition that there might be a difference of opinion on.

Mr. Graves: I don't want to belabor the point but the very beginning of the Chapter says, “In construing this Chapter and each and every word, phrase or part hereof where the context will permit”—and then it says, “Negroes” shall mean a certain thing— $\frac{1}{8}$ th Negro blood, and I submit there is no such thing as Negro or white blood.

The Court: That being so, they must have meant something else.

Mr. Graves: What else could they have meant?

The Court: They meant anyone whose blood is $\frac{1}{8}$ th from a Negro ancestor:

Mr. Graves: If we are going to interpret the word "blood" as meaning ancestor, then there has been no demonstration about whose ancestors belong to whom.

The Court: Then we come back to the appearance again.

Mr. Graves: It becomes now incumbent upon the State [fol. 108] to show who the ancestors were within eight degrees, and I submit they can't do either.

The Court: I still say we have to go by what the intention of the legislature was. I feel that the jury is going to decide this and the Court is going to rule that anybody who had considerable experience in dealing and associating with Negro people and white people will be able to testify to some extent at least as to the race of particular persons. When it comes to a question of a doubt or a reasonable doubt, that is something else, but it is going to be up to the jury.

Court will stand in adjournment until 2 o'clock.

(Thereupon a recess was taken until 2 o'clock P.M. of the same day.)

[fol. 109]

Afternoon Session,

June 28, 1962

2 o'clock P.M.

(Appearances of counsel as noted.)

Thereupon, the following proceedings were had:

Mr. Gold: Before we bring the jury back, I ask that the Court further instruct the jury that any statements made by one defendant in the presence of the other defendant are admissible as to both.

The Court: It depends on the circumstances.

Mr. Tanksley: There have already been some statements made where both were present and since the Court has instructed the jury as to statements made by one not in the presence of the other are not admissible as to the other person, we feel there might be some confusion in the jurors' minds.

The Court: I can't instruct them on that except as the occasion arises. That is not quite true that all admissions made by one defendant in the presence of another are ad-

missible. Sometimes it is, and sometimes it isn't. I can't give that instruction except as the question arises.
[fol. 110] Mr. Gold: May we have the last question and the Court's ruling.

(The pending question was read by the Reporter as above recorded.)

The Court: I might let you do it with one witness in order to get it into the record, but I am not going to let you ask every witness that comes up here. I don't know whether the witness is any more qualified than the jury to form an opinion on that since the defendants are before the Court and jury.

Mr. Gold: Will your Honor let me ask it of this witness, plus any other witness I might determine I want to ask.

The Court: I don't know. It seems sort of—

Mr. Gold: In this case, it was brought out on cross examination as to how he knows and so forth. I think he has opened the door. It was all brought out by cross examination. As I recall the testimony, Mr. Graves asked the witness, "How do you know if he is colored or white?" It was brought out by Mr. Graves and I think we should have a right to ask their opinion.

The Court: I will let you ask this witness.
[fol. 111] It has already been asked and there has been some discussion on cross examination on it but that doesn't mean I am going to allow you to ask every witness that.

The motion for a directed verdict is denied and the objection is overruled.

(Thereupon the jury returned to the Courtroom, and the following proceedings were had:)

Mr. Gold: We concede the presence of the jury in the box and waive polling.

The Court: The jury is in the box. Proceed.

Thereupon: NICHOLAS VALERIANI, the witness on the stand at adjournment resumed the stand, was examined and testified further as follows:.

Redirect examination (Continued).

By Mr. Gold:

Q. Officer, I believe I asked you just prior to the jury being sent out before lunch whether or not based on your previous association with people of different races, do you have an opinion as to what race the defendant Dewey McLaughlin is?

A. Yes.

[fol. 112] Q. What is that opinion?

A. Due to my prior factual contacts, experiences and observations and having gone to school with members of the Negro race, I would consider him a Negro.

Q. What is your opinion in reference to the other defendant, Connie Hoffman, also known as Connie Gonzalez?

A. I would say unequivocally that she is a white female.

Mr. Gold: That's all.

Recross examination.

By Mr. Graves:

Q. During your associations with Negroes, you have noticed there are various colors of colored people, are there not?

A. Yes.

Q. Isn't it a fact that by reputation many so-called Negroes or mulattoes are fairer than white people you have associated with?

A. I would presume that to be true.

Q. Well now, could it not be possible that the defendant Hoffman is a Negress in the light of that experience?

A. I would not think so. It may be possible but on [fol. 113] my own observations and from everyday notice-abilities I would not think so.

Q. If you admit that it is possible for her to be a Negro, you could be mistaken in your opinion.

A. I didn't state that and I don't think you had asked it that way. I think you alluded something to the possibility that she may have Negro blood.

Q. I said based upon your association with the colored race; I will ask the question again for clarity: Based upon your association with the colored race, you have found people who are reputed to be colored who are fairer than the defendant Hoffman?

A. Yes.

Q. In the light of that experience, Miss Hoffman could be colored, couldn't she?

A. I would not think so due to her coloring and physical characteristics. I would not think so.

Q. What is it that distinguishes her from fairer mulattoes?

A. Skin texture, her hair, her eyes, coloring.

Q. But you said just a minute ago, officer, that there are people who are reputed to be Negroes who are fairer than Mrs. Hoffman.

[fol. 114] Mr. Gold: I object to any further inquiry. The detective has already answered the question twice.

The Witness: I thought you were referring to fairer than Negroes, fairer than others. That is what you stated.

By Mr. Graves:

Q. Again—

(The pending question was read by the Reporter as above recorded.)

The Witness: I didn't understand the question.

By Mr. Graves:

Q. Is that correct?

A. If that was the question, I wouldn't state that.

Mr. Graves: I have no further questions.

Thereupon: SY LIPPMAN was called as a witness by the State of Florida, and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Gold:

Q. Please state your name and official position.

A. Sy Lippman, Identification officer, Miami Beach Police [fol. 115] Department.

Mr. Graves: Pardon me, Mr. Gold, may I ask a question concerning this witness' presence in the courtroom?

Mr. Gold: Yes.

By Mr. Graves:

Q. Were you in the courtroom this morning prior to—

Mr. Gold: I think the jury ought to be excluded for this particular question and answer, your Honor.

The Court: I don't think so.

By Mr. Graves:

Q. Were you in the courtroom prior to your coming into that door a few minutes ago?

A. No, sir.

Q. You haven't been here at all?

A. No, sir.

Q. Have you heard any of the testimony in this case?

A. No, sir; not today.

Mr. Graves: All right.

By Mr. Gold:

Q. Your name and official position?

A. Sy Lippman, Identification officer, Miami Beach police [fol. 116] department.

Q. Do you know the defendant, Dewey McLaughlin?

A. Personally, no.

Q. Do you know who he is?

A. Yes.

Q. Do you see him in the courtroom today.

A. Yes.

Q. Point him out.

A. Sitting directly opposite you there. (Indicating the defendant Dewey McLaughlin.)

Q. I show you State's Exhibit 1-B for Identification and ask you to state what that is.

A. This is the official form for fingerprints that we use at the headquarters for arresting parties, arrested people.

Q. Did you take those fingerprints of the defendant?

A. I did.

Mr. Gold: Your Honor, I would like to offer this into evidence as State's Exhibit 2 and would like to substitute a photostatic copy of it since these are official police records.

The Court: Submit it to counsel.

By Mr. Gold:

Q. Is there certain other information which appears on [fol. 117] the card in relationship to the defendant other than the fingerprints?

A. Yes. There is other information—personal data that is filled in there and the fingerprint classification.

Mr. Graves: May I ask the witness a question?

The Court: Yes.

By Mr. Graves:

Q. Mr. Lippman, I suppose this is a standard fingerprint card used by the Miami Beach police department, is it not?

A. Yes, it is.

Q. What is the procedure in compiling the information? Does the suspect or the prisoner type this card up himself or is that done by someone in your office?

A. Somebody in our office does it.

Q. Who did it in this instance?

A. Sgt. Hobson.

Q. Where is Sgt. Hobson now?

A. Out in back.

Q. He is here?

A. Yes.

Q. To your knowledge, does the officer making out these [fol. 118] identification and record cards ask the questions of the individual or does he merely upon observation of the person insert the information on this card.

A. A combination of the two, I would say.

Q. You were not present when this card was compiled?

A. I was.

Q. During the time in which this information was being compiled, who was present?

A. I was present; the prisoner was present and the officer I just mentioned—Sgt. Hobson.

Q. Who was doing the questioning, if you recall?

A. Sgt. Hobson.

Q. Will you please tell the Court and jury exactly what you recall relative to what was said between Officer Hobson and Dewey McLaughlin at the time that this information was compiled.

A. That would be difficult to say. I was present in the office but not necessarily listening to the interview at the time. Exactly what I might have heard as to age, date of birth, place of birth and so forth, I couldn't very well state specifically.

[fol. 119] Q. As a matter of fact, you didn't hear Dewey McLaughlin say that he was a male either, did you?

A. No. There are many things that are presumed; you don't have to ask.

Q. And as a matter of fact— Oh, this is a presumption given on this card.

A. As to male or female?

Q. Yes.

A. Yes.

Q. Is it a presumption he is a porter, also?

A. No; that would have to be asked the persons. The profession would have to be asked.

Q. Do you recall hearing Officer Hobson ask Dewey McLaughlin about his race?

A. I don't recall.

Q. As a matter of fact, you don't know whether Dewey McLaughlin said it at all, do you?

A. I don't know.

Mr. Graves: If your Honor please, we object to this State's Exhibit 1-B on the grounds that the information that it purports to give which would be relevant and material to the issues here are not necessarily the statements [fol. 120] which come from the defendant himself but rather the conclusions of the person who compiled the information, as far as the testimony is at this time.

The Court: So far, yes. Sustained.

Mr. Graves: That's all.

Thereupon: SGT. CURTIS HOBSON was called as a witness by the State of Florida, and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Gold:

Q. Please state your name.

A. Curtis Hobson.

Q. You are with the City of Miami Beach Police Department?

A. Yes.

Q. Identification Bureau?

A. That's correct.

Q. Do you know the defendant, Dewey McLaughlin?

A. Yes.

Q. Do you see him in the courtroom today?

A. Yes.

Q. Point him out.

[fol. 121] A. There he is. (Indicating the defendant Dewey McLaughlin.)

Q. I show you State's Exhibit 1-B for Identification and ask you to state whether you can identify the same.

A. Yes.

Q. What is that?

A. That is the arrest fingerprint card of Dewey McLaughlin.

Q. What exactly did you have to do with that card?

A. I took the information.

Q. From the defendant?

A. Yes.

Q. Did you type the information?

A. Yes.

Q. Where was the defendant in relationship to you and that card when you were typing the information?

A. He was standing next to me.

Q. Was he in a position to see the card?

A. I can't say. He probably was, but I can't remember exactly where he was standing.

Q. Did the defendant at any time attempt to make any [fol. 122] corrections in the information on that card?

A. No, sir.

Mr. Gold: I will re-offer the exhibit into evidence, your Honor.

By Mr. Graves:

Q. Officer Hobson, who was present when this information was compiled which appears on State's Exhibit 1-B for Identification.

A. Besides myself, the officer who took the fingerprints and the jailer—I can't recall who that was—the jailer. That is all, I guess.

Q. Dewey McLaughlin didn't give you the information that appears on this card, did he?

A. Probably not word for word.

Q. I ask you to look over this exhibit for identification and tell me as closely as you can what information he gave you or told you.

A. I have to have the arrest slip rather than this card. The arrest slip is what has the information, the white arrest slip. That is the one that I filled out.

Q. Then as a matter of fact, officer, as you sit there now you don't know which information, if any, was given to you by Dewey McLaughlin?

A. If I could have that arrest slip I could show you [fol. 123] what questions I asked him.

Mr. Gold: In other words, you based the information on that card from the arrest slip, is that correct?

The Witness: Yes.

Mr. Graves: Just a minute, Mr. Gold. Who compiled that information?

Mr. Gold: Did you compile the information on this arrest slip?

The Witness: I filled it out.

By Mr. Graves:

Q. Mr. Hobson, you say you compiled this information yourself?

A. That's right.

Mr. Gold: Would you show the exhibit to the witness, please.

By Mr. Graves:

Q. Did Dewey McLaughlin give you all that information that appears on that arrest slip?

A. No. Some of this we had. He had a civilian card so it wasn't necessary to ask him each item because I had the information in front of me, some of it—his local address—that I probably asked him, but that also appeared on the little yellow card.

Q. You didn't ask him which race he belonged to, as a matter of fact, did you?

[fol. 124] A. No; there wasn't any reason to. I already had the information.

Mr. Gold: We offer the exhibit into evidence, your Honor. The witness testified the defendant was in a position to observe what was being typed and made no statements in reference to what was being put on that card.

The Court: Was there an objection?

Mr. Graves: If your Honor please, I did object.

The Court: Sustain the objection.

By Mr. Gold:

Q. You also took the information and typed the identification card record for defendant Connie Hoffman; is that correct?

A. Yes.

Q. Did you follow the same procedure?

A. I did.

Mr. Gold: No further questions.

Mr. Graves: We have no further cross examination.

Thereupon: JOSEPHINE DeCESARE was called as a witness by the State of Florida, and having been first duly sworn, was examined and testified as follows:

[fol. 125] Direct examination.

By Mr. Gold:

Q. State your name and official position.

A. Josephine DeCesare, secretary, City Manager's office, Miami Beach.

Q. What was your course of employment on the 12th day of January, 1961.

A. Clerk-typist in the police department.

Q. I show you State's Exhibit 1-D for Identification and ask you if you can identify same.

A. Would you please repeat that.

Q. Tell the jury what this card is.

A. It is a civilian registration for all those who work on Miami Beach.

Q. Who is that civilian registration card for?

A. Dewey McLaughlin.

Q. That card is signed by the defendant, is that correct?

A. Yes.

Q. And there are a series of questions and information on that card?

A. Yes.

Q. You, as the typist, do you ask any of those questions of the persons?

[fol. 126] A. Yes.

Q. Would you read to the Court exactly what questions pertaining to information on that card that you actually asked defendant Dewey McLaughlin.

A. First the name is always verified.

Q. What is above that name?

A. Signature of person fingerprinted. "I certify that I have read the information given here"—I better put on my glasses.

Mr. Graves: While the witness is looking for her glasses, we should like to interpose an objection. We object to this witness testifying as to what the usual procedure is. We would like to have her pinpoint what she did on this particular instance when the information was compiled, if she did anything at all.

Mr. Gold: I believe that is what she is testifying to, your Honor. I asked a specific question.

The Court: That was the question but she didn't actually indicate in her answer. I think you perhaps should be more specific.

By Mr. Gold:

Q. Did you follow the usual procedure in this case?

A. Yes.

[fol. 127] Q. Read what it says there.

A. "I certify that I have read the information given hereon, and that it is true."

Q. Tell me what questions you actually asked the defendant and what answers he gave you.

A. Employment and address.

Q. What did he say to that?

A. At that time it was the Promenade Hotel, 2469 Collins Avenue as a porter. Then his height, his weight, date of birth, color of hair and eyes and then where he was born and if he is a United States citizen.

Q. What else did you ask him?

A. His address. And the last— We try to get a contact address if they have not resided here ten years. If it is over ten years, we don't ask their last northern address—and marital status.

Q. What was the answer?

A. At that time he was separated and his wife's name was Willie McLaughlin, and he did not know her last address.

Mr. Gold: I will offer this, your Honor.

Mr. Graves: May I inquire, just briefly.

[fol. 128] The Court: Yes.

By Mr. Graves:

Q. Mrs. DeCesare, is your method of operating in compiling the information on these cards the same in cases in which the applicant can read and write as it is in cases where he is illiterate.

A. I don't follow you.

Q. If the person supplying the information is illiterate, do you use the same process in compiling the information on these cards as you do when he is literate?

A. That is if he can't read or write? Yes, sir.

Q. The same process?

A. Yes.

Q. Although it says he certified he has read the card and he cannot read it, you use the same process.

A. That he has read the card?

Q. Yes.

A. Usually they have someone with them.

Q. Was anyone with Mr. McLaughlin when he came in to apply for this identification card?

A. Not that I remember.

Q. Do you remember anybody reading the information [fol. 129] on this card to Mr. McLaughlin?

A. Reading? No, sir.

Q. As a matter of fact, you didn't see him read it either, did you?

A. Read what—the card?

Q. This card where it says at the top in the lefthand corner, "I certify that I read the information given hereon and that it is true."

If a person is literate do you use the same procedure in compiling information and getting the certification?

A. If they cannot write, sir, they signify with an X mark which I witness.

Q. I said read.

A. I am confused.

Q. Do you know whether or not Mr. McLaughlin can read?

A. No.

Q. Do you recall?

A. No.

Q. Did you see him look at this thing.

A. No, sir; he didn't ask for it.

Q. You typed up all this information and then said, "Here, sign this", is that right?

A. No; it is signed before he comes over to me and then [fol. 130] if he wishes to check, he can, after I have interviewed him.

Q. Who else participates in compiling this information besides you?

A. You mean the questions or fingerprints and everything connected with the registration?

Q. The questions.

A. I am the only one.

Q. I want you to think back and see if you can recall whether or not Dewey McLaughlin actually read this thing before putting his signature on it.

A. As I told you, if he read it, he read it before he was fingerprinted; after he got the—after I got the information if he read it, I don't know.

The Court: Did I understand you to say you have him sign it before you put the information down?

The Witness: They can sign it before or after but usually as soon as they come into the office to be fingerprinted the card is handed to them and it is signed. Then after it is filled out, they go back and can check what is written on there. Do I make myself clear?

The Court: Not exactly.

[fol. 131] Mr. Graves: I object to the exception of this exhibit for identification on the grounds that it has a false certificate. It says he read the information on there and it wasn't even there at the time he signed it, according to this testimony.

Mr. Gold: There is some further pertinent information on that card which was elicited directly from the defendant.

The Court: Maybe I better take a look at it.

Mr. Gold: Especially in reference to his marital status, which is apparently an issue in this case.

The Court: Let's not go into what is on here. Sustain the objection.

Mr. Gold: May I have further argument on this point?

The Court: Take the jury out.

(Thereupon the jury retired from the Courtroom, and the following proceedings were had:)

Mr. Gold: Your Honor, the witness testified in response to direct examination about direct questions asked the defendant in reference to his address and also his marital [fol. 132] status. That is an issue in this case, apparently.

The Court: When was it made an issue; I don't remember that.

Mr. Gold: On voir dire.

The Court: You can't make something an issue on voir dire.

Mr. Gold: Also it is set forth in the information.

The Court: What is.

Mr. Gold: It is set forth in the Information, that they are not married. There is no way possible for the defendant McLaughlin to be married to this other defendant if he has a previous wife.

Mr. Graves: Yes, your Honor, but there is something that counsel is over-looking and that is that the information which is on this card was not necessarily given by Dewey McLaughlin.

Mr. Gold: She said it was.

Mr. Graves: She has a certificate that Dewey McLaughlin says everything he says is true.

The Court: There are two things. One is she says he gave the information that is on there and the next thing is that as far as his signature is concerned, there is some [fol. 133] doubt as to whether he certified anything after it was on there.

That is a different question and incidentally that is the point which makes the document itself inadmissible to go before the jury, but she can still testify as to what he told her.

Mr. Graves: My objection is to the reception of the document.

The Court: And I have sustained the objection.

Mr. Tanksley: Would it have to be certified to be admitted in evidence?

The Court: There is some other information on there which she has not yet testified was given to her by the defendant. Race is such a material issue in this case that it could be prejudicial.

By Mr. Gold:

Q. What exactly on this card did you get? Go down this information. You asked his address?

A. Yes.

Q. And his northern address?

A. Yes.

Q. And his marital status?

A. Yes.

The Court: Don't lead her. She can answer. We won't [fol. 134] have the right proceeding here.

By Mr. Gold:

Q. Did you ask about his sex?

A. Why, no.

Q. Did you ask about his race?

A. No. It is quite obvious what the answer to those two questions is.

May I say something—

Mr. Gold: I have no further questions.

The Court: She wants to say something.

The Witness: Anything that is answered by someone else other than the person who signed it usually is signified by a notation or his initial. In other words, when you were referring to someone who could not read or write—

Mr. Graves: I would ordinarily move to strike that, but the jury isn't here and what they usually do has nothing to do with what was done in this particular case.

The Witness: We do the same thing in every case.

By Mr. Graves:

Q. You will admit you testified you don't know what you did in some respects in this case; is that not so?

A. No; I know what I did. I said I did not ask the question [fol. 135] pertaining to sex or race. Everything else I asked. Otherwise, how would I get the information?

Q. Specifically, what did you ask when you asked about his marital status?

A. Was he married, single, separated, divorced or a widower.

Q. You didn't go into any discussion with him as to whether or not he had a divorce?

A. No, sir. He has to answer which one of those is correct.

Q. As a matter of fact, you don't know whether he is now or ever was married?

Mr. Gold: I object to the question.

The Court: All she could know is what he said.

By Mr. Graves:

Q. But he said he was separated?

A. Yes.

Q. And he didn't say legally separated; or did he?

A. No.

Mr. Gold: A legal separation is not a divorce. Counsel should know that.

Mr. Graves: We are speaking in terms of what the ordinary citizen would walk in and if somebody would say, "What is your marital status?"

The Court: She testifies she gives him certain alternatives.

By Mr. Gold:

Q. Did you ask whether or not he was divorced, specifically?

A. Yes. "Are you married, single, separated, divorced or a widower, or a widow?"

Mr. Gold: I want to ask one question: Since apparently the Court's only objection to this card is the fact of the certifying aspect, I have a photostatic copy. Would it be permissible if the certificate was just cut off from the rest of the document since that seems to be the basis of the Court's sustaining the objection? As a matter of fact, the photostat doesn't even have the signature on it.

Mr. Graves: I thought your Honor ruled that the original was not even admissible.

Mr. Gold: I was going to offer to substitute the photostatic copy for the original, if the original was permissible, but if necessary I will cut it off the original if counsel

won't agree to have me substitute and I would request to substitute the photostatic copy.

[fol. 137] The Court: I don't know how it can be admissible.

Mr. Gold: Your Honor indicated that the only objection was on the basis—or the basis for having sustained the objection, was the fact that the defendant probably signed the card before the information was written on it and that it was a certificate that he himself certified that the information is true.

The Court indicated that would be prejudicial. I am saying I think the information on the card would be admissible.

The Court: How can it be held against him if he doesn't sign it.

Mr. Gold: The witness has testified it is a record that he is in a position to see— This is not a fingerprint or arrest card. This is an application for a civilian ID card. It has nothing to do with any criminal process.

The Court: The fact that it is written down would have no more weight than the fact that she asked a question and he gave her the answer. She can testify that he did. The fact that she wrote it down doesn't add anything. I don't understand the argument on that point. She can testify as to what she asked and what he said. The document is not [fol. 138] admissible because there is some doubt as to whether he read it and certified to its accuracy.

Bring the jury in.

(Thereupon the jury returned to the Courtroom and the following proceedings were had:)

Mr. Gold: State concedes the presence of the jury.

Mr. Graves: Defense does likewise, and waives polling thereof.

By Mr. Gold:

Q. You said you were employed at one time as a typist for the City of Miami police department?

A. Yes.

Q. During the course of your employment you had occasion to see Dewey McLaughlin?

A. Yes.

Q. What was that for?

A. Civilian registration.

Q. In the course of your contact with him did you ask him various questions and did he make various responses to those questions?

A. Yes.

Q. Tell us what questions you asked him and what he responded. You may use your notes to refresh your memory.

[fol. 139] Mr. Graves: I would like to have counsel pin down the time and place of the conversation between the witness and the defendant.

The Court: All right.

By Mr. Gold:

Q. Tell us when this took place.

A. January 12, 1961.

Q. Where?

A. In the police identification bureau in the Miami Beach police department.

Mr. Graves: I would like to interpose an objection. The effect of this witness' testimony is at a time prior to the time when this offense was alleged to have occurred. Are we going to get into his marital status some time before.

The Court: I think you will find there is some other information which might lead to a different later time element. Overrule the objection anyway.

By Mr. Gold:

Q. Tell us what actual questions you asked him and what answers he gave?

A. When—the first time when I interviewed him I asked him his name. He had just signed Dewey McLaughlin—he had no middle name. I asked where he worked—Promenade Hotel as a porter. Then I asked his height and [fol. 140] weight. Do you want that information? And the date of birth.

Q. What was that?

A. October 10, 1923 and his color of eyes and hair.

Q. What did he tell you about his color of hair?

A. Brown.

Q. And his eyes?

A. Brown, and place of birth was Lacieba, Honduras, and I asked if he were a United States citizen?

Q. What did he say to that?

A. Yes.

Q. What else?

A. His local address at that time was 1106 Northeast 1st Avenue, Apartment 311, and the last address before he came to Miami was Lacieba, Honduras and his marital status, I asked if he were married, single, separated, divorced or a widower.

Q. What did he say?

A. He said separated and I asked for the name of his wife and he said Willie May McLaughlin, and he did not know her last address.

Q. Did you ask any specific questions in reference to the defendant's race?

[fol. 141] A. No; that question I did not ask.

Q. Did you yourself have an occasion to see the defendant on a later occasion?

A. No, sir.

Mr. Gold: No further questions.

Mr. Graves: No cross examination.

Thereupon: DOROTHY KAABE was called as a witness by the State of Florida and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Gold:

Q. Please state your full name and address.

A. Dorothy Kaabe, 1775 Coley Drive, Normandy Isle, Miami Beach.

Q. By whom are you employed?

A. Florida State Department of Public Welfare.

Q. What capacity is your employment?

A. Child welfare worker.

Q. In the course of your employment did you have an occasion at any particular time to have a conversation with [fol. 142] one Connie Hoffman, also known as Connie Gonzalez?

A. Yes.

Q. Do you see that person in the courtroom today?

A. Yes.

Q. Point her out, please.

A. (Indicating Connie Hoffman.)

Q. When did that conversation take place?

A. It was March 5, 1962 at 2 o'clock in my office.

Q. In the State Department of Public Welfare?

A. Yes.

Q. Who else was present besides yourself and the defendant, Connie Hoffman?

A. There was no one else present.

Q. Would you please relate that conversation to the Court and jury.

A. Connie Gonzalez came to my office on my request to discuss the child that she had and we had in our care. I had to inquire of her as to her background; her police report that had come in had said her name was Connie Gonzalez, also known as Connie Hoffman, so therefore I had to inquire where these names came from.

She related to me that the child's father was Robert Gonzalez, with whom she lived for about five months and [fol. 143] this was in 1956.

She said she left Mr. Gonzalez before the child was born and when the child was four months old she lived—she stated she lived in a common-law relationship with Mr. Gonzalez.

I asked if she had ever legally married him and she said no, she had never had a legal divorce. When the child was four months old she said she moved in with a man named Fred Hoffman and she said she lived intermittently with Mr. Hoffman for approximately five years and he was the sole support for herself and her child, and I asked if she had legally married Mr. Hoffman and she said no, because of his age.

Mr. Hoffman is at present 59 years old, and she said sometime in September or October of 1961 she left Mr.

Hoffman and took another apartment on Miami Beach and she began living with Mr. McLaughlin as her common-law husband.

She said she had no legal marriage to this man but she stated there had been no marriages nor any divorces.

Q. Did you have any conversation at all with Connie Hoffman as to what her racial status was?

A. Yes.

[fol. 144] Q. Tell us what was said along those lines.

A. She said she was white. The reason this came up was because the report I had gotten from the Juvenile Bureau stated she had been living with Dewey McLaughlin and in the course of her conversation she told me she had retained Attorney Graves and I asked why she had an attorney and she told me the reason she had been arrested was because she was living with a Negro man on the Beach and the police had arrested her, so she had gotten Attorney Graves to help her.

I asked if she knew there was a Statute prohibiting that and she said yes she did but she intended to go to the Supreme Court.

Q. But in response to that question she did say she was of the white race?

A. And I questioned whether Mr. McLaughlin was a Negro and she said yes, but she believed his grandmother was white.

Q. She told you Mr. McLaughlin was a Negro?

A. Yes.

Q. Did the defendant Connie Hoffman state to you anything about her family background other than what you have testified?

A. Her immediate family?

Q. Yes.

[fol. 145] A. Yes. I questioned whether there were any relatives available who might be able to take care of the child. She mentioned she had a mother who lived in Birmingham, Alabama but she would rather her mother not be notified of this because she intended handling it herself.

She mentioned she had a brother who was a leader of the KKK in Alabama. She said she had one brother living in Miami.

Q. Did she indicate where she was born?

A. She told me she was born in Birmingham, Alabama.

Mr. Gold: You may inquire.

Cross examination.

By Mr. Graves:

Q. Miss Kaabe, at the time that you had this conversation with the defendant Connie Hoffman, did you advise her that the information which she was giving you might be used in a court of law or anything like that?

Mr. Gold: I object to that. First of all, she is not a policewoman and not obligated under the law to advise anybody as to what their rights are. It is an improper question.

The Court: Overruled.

[fol. 146] The Witness: I advised her that the information she had given me was confidential but if I am subpoenaed into court I must present this information.

Q. Isn't it a fact that at the time the conversation took place that Connie Hoffman's son was in the custody of the State Welfare Board?

A. That's right.

Q. And isn't it a fact that she gave that information expecting to cooperate and get the child back. Isn't that her reason for being there?

A. Yes.

Q. By the way, how did the State Welfare Board get into this matter?

A. What matter?

Q. Into the matter of the custody of the child and the dependency question.

A. The child was placed in our care by the Juvenile Court.

Q. Do you know the history of the case?

A. From the police report, yes.

Q. Was it referred to the Juvenile Court by the police department?

A. By the Miami Beach police department.

Q. Did you ask Mrs. McLaughlin about her background [fol. 147] when she was questioned by you in your office?

A. Yes.

Q. What did she say about the years she had been in school, if anything?

A. I believe she stated that she went to about the eighth grade or higher than that and then she had to leave home because her mother was ill and she had to go to work.

Q. She didn't say anything about any professional training of any kind, did she?

A. No, she didn't.

Q. So any opinion which Mrs. Hoffman gave you relative to the racial status of anybody involved here would be only an opinion, wouldn't it?

A. Yes.

Q. As a matter of fact, very few people really know what a Negro is; is that right?

Mr. Gold: I object to that as argumentative.

The Court: Sustained.

By Mr. Graves:

Q. Do you know what a Negro is?

A. I am not sure I understand your question.

Q. I don't know that I can make it any simpler. Do you know what a Negro is.

[fol. 148] A. A Negro is a human being, one of three races.

Q. What distinguishing characteristics are there between the Negro race and other races?

A. Skin color, facial—

Q. How long have you been employed by the State Welfare Board?

A. Two years.

Q. You have been here in Miami?

A. Yes.

Q. You have had a pretty good opportunity to observe people who are commonly referred to as Negroes, haven't you?

A. Yes.

Q. Isn't it a fact that in your experience you have found there are many people who are reputedly Negroes who are by far fairer than white people who are accepted as such?

A. Yes.

Mr. Gold: I don't quite understand the question.

(Thereupon the question was read by the Reporter as above recorded.)

By Mr. Graves:

Q. Isn't it a fact, Mrs. Kaabe, that you have known in [fol. 149] stances when a person who is reputed to be a Negro would have the same texture of hair as people who are reputed to be white?

A. I have never known anyone personally.

Q. What about those that you have been associated with on a casual basis, more or less.

A. Would you repeat your question?

Q. I am referring back to the question I just asked about the texture of the hair. What about Negroes or people who are reputed to be Negroes having the same texture of hair as white people who are accepted as being Caucasian? Have you had any kind of experience such as that, even though you didn't know them personally?

A. No, sir.

Q. You have never known of such?

A. No.

Q. In other words, the very light-skinned Negro whom you have seen who could be easily confused with what your conception of a Caucasian is—

Mr. Gold: Your Honor, I object to the question as argumentative.

The Court: Sustained.

By Mr. Graves:

Q. Mrs. Kaabe, I wish you would reflect back to the conversation between you and Mrs. Hoffman and tell me [fol. 150] whether or not Mrs. Hoffman said in response to your question as to Dewey McLaughlin's race, "He is charged with being a Negro"?

A. Mrs. Hoffman said that she was arrested because she had been living with a Negro.

Mr. Gold: Will you speak louder?

The Witness: Mrs. Hoffman told me she had been arrested because she was living with a Negro. She did not say Mr. McLaughlin had been charged nor arrested. She said she was arrested.

Mr. Graves: No further questions, your Honor.

Mr. Gold: At this time the State will proffer the persons of the defendants to the jury for their consideration.

Mr. Graves: If your Honor please, at this time we would like to have the jury excluded and the witness step out also.

(Thereupon the jury retired from the Courtroom and the following proceedings were had:)

Mr. Graves: If your Honor please, the State now offers in evidence, I suppose, Exhibits 2 and 3, being the defendants, which is highly improper and to which we very strenuously object for this reason:

One, it isn't their desire to be proffered; two, if they do not desire to be proffered, as evidence in this case, then the [fol. 151] effect of the thing is the requirement that they offer evidence and testimony against themselves which is self-incrimination, pure and simple.

I have a case here, your Honor, which is on point here. I didn't find a Florida case, but we have an Alabama case, *Wells v. State* 101 Southern 624. In that case the question came up as to whether or not the State could require the defendant to match his footprints with certain footprints found at the scene of the crime, and this question came up as to whether or not to require him to do so would be self-incriminatory. The Supreme Court of Alabama held this would be self-incrimination.

Mr. Gold: I have a later Alabama case which is more on point. It basically states it was not error for the State to proffer the defendant to the jury. 101 Southern 417, *Wilson v. Hote*.

The Court: Apparently there is a lot of disagreement on the subject but at any rate, it is the opinion of this Court that the State can't proffer the persons of the defendants in evidence or otherwise. You might be able to compel them to stand up and be identified but you cannot offer in evi-

dence which is actually what you are doing, the persons of the defendants against their will.
[fol. 152] Mr. Gold: State rests.

MOTION FOR DIRECTED VERDICT AND DENIAL THEREOF

Mr. Graves: May it please the Court at this time on behalf of both defendants, we renew our motion for a directed verdict on the grounds that the State has failed to prove a prima facie case in that the State has failed to prove the race of either Connie McLaughlin or Connie Hoffman or Dewey McLaughlin.

We submit this is a criminal proceeding in which the State is required to prove beyond and to the exclusion of a reasonable doubt that all of the allegations in their Information are true and in this case we have a Statutory definition of what is a Negro.

There has been no one to take the stand who could unequivocally testify to whether either Connie Hoffman was a member of the white race or whether Dewey McLaughlin was a member of the colored race.

They made various attempts to get evidence in which would amount to confessions that they were members of the respective races which your Honor has excluded.

We submit since the State has not proved all of the allegations of the case on their direct case that we are entitled to a directed verdict and that the defendants be discharged at this time.

The Court: Motion denied. Are you going to put on any [fol. 153] testimony?

Mr. Graves: There is something I omitted, and that is they have failed entirely to prove that these people were not married. That is part of the Statute and the Information.

Mr. Gold: We proved by one's defendant's conversation with the other that she was married to someone else, had a common law marriage and by the statement of Dewey McLaughlin that he had a wife.

Mr. Graves: That is a negative.

Mr. Gold: As a matter of fact, your Honor, the State is not required to prove a negative.

Mr. Graves: You have to prove that they are not married. There has been no testimony at all regarding the

dissolution of any marriages which might have existed prior to the time these people were alleged to have started living together and I think it is incumbent upon them to prove that allegation.

The Court: It has been proved that they both were using different names. There is evidence that the last time there was any record was separated from a former wife and possibly still is. Any statements by the other defendant to welfare workers, and otherwise of various relationships with people. The motion is denied.

[fol. 154] Mr. Graves: The welfare worker testified Connie Hoffman told her she was married to Dewey McLaughlin.

Mr. Gold: That was her statement.

Mr. Tanksley: She further said she was married to Gonzalez; that she never obtained a divorce. She had a child by this man and then she started living with Hoffman and did not marry him because he was too old and then started living with Dewey McLaughlin.

The Court: I am pretty sure she said she was never legally married.

Mr. Tanksley: And she said she established one with Gonzalez and she never divorced him and that he is the father of the child she has now.

Mr. Graves: Mrs. Kaabe did not say that Miss McLaughlin said that. Can we check the record?

The Court: Yes, but I am thinking there were other statements made by the defendant to the officers and otherwise which would indicate no marriage. I will deny the motion.

Are you going to put any testimony on?

Mr. Graves: The defendants rest.

The Court: Let's have a recess before we start the argument. [fol. 155] Let's look at the jury charges.

Does the defense have any objection to State's No. 1?

Mr. Graves: No objection to the State's Request of Instructions No. 1.

The Court: State's No. 2?

Mr. Graves: We request the Court to instruct the jury that in reaching a conclusion as to whether or not one of these defendants is a Negro and the other is a white

person, that they are to be guided by the definition which is a part of the Statute under which this Information has been charged, to-wit: that they must find that there is in one person's veins one-eighth Negro blood and the other seven-eighths—

Mr. Gold: Of course I object to counsel's interpretation of that statute. We have had this discussion before, especially as set forth in the charge.

The Court: Let's see the Statute again. What is the State's objection to that definition. Let's leave that one go for a minute. Let's go to the Defendant's No. 1.

Mr. Gold: I object, of course, and request that the Court read the Statute and strike out the veins—that is not in the statute.

I think any reasonable man can infer what the statute refers to.

[fol. 156] The Court: Yes. If the Statute does not say anything about veins, I am not going to instruct them "at least." Also it appears that your "at least seven-eighths" is not correct. "At least" would mean if someone had $\frac{7}{8}$ ths—I think instead of at least seven-eighths, it would be saying more than seven-eighths because if a person was $\frac{7}{8}$ ths white and $\frac{1}{8}$ th colored, or Negro, according that definition, he would be a Negro.

So, therefor, at least seven-eighths is not enough. It would have to be more than seven-eighths.

Mr. Gold: Why doesn't the Court just read "one-eighth or more"?

The Court: I will think about it. Let's go on to No. 2.

Now, No. 3 is denied. We will take a ten-minute recess now.

(A short recess was taken, after which the following proceedings were had:)

The Court: At this time the Court will give its ruling. As to the State's Requested Instructions, requested instruction 1 will be given. State's requested instruction 2 is denied.

As to Defendant's Requested Instruction No. 1 and 2 [fol. 157] will be given, not exactly the same, in the same form, but will be given in connection with the Court's own

instruction. No. 3 is denied. No. 4 is denied but the Court will give an instruction on common-law marriage.

Bring the jury in.

(Thereupon the jury returned to the Courtroom, and the following proceedings were had:)

Mr. Gold: State concedes, waives polling.

Mr. Graves: Defendants likewise.

The Court: The jury is in the box. The defense objection to the proffer by the State is sustained and the jury will disregard the last statement of the prosecuting attorney.

Does the State rest?

Mr. Gold: Yes.

Mr. Graves: Defense rests, your Honor.

The Court: Proceed with the argument. Defense has opening.

WAIVER OF ARGUMENTS BY COUNSEL FOR THE PARTIES

Mr. Graves: Defense waives its opening argument.

Mr. Gold: State will waive argument, your Honor.

The Court: In that event, we will have to have another five-minute recess to get the instructions in order.

[fol. 158] Mr. Gold: Will the Court make some instruction to the jury as to why there is no argument.

The Court: Yes.

(Thereupon a short recess was taken, after which the jury returned to the Courtroom and the following proceedings were had:)

Mr. Gold: State concedes the presence of the jury.

Mr. Graves: Defense concedes.

COURT'S CHARGE TO JURY

The Court: Members of the jury, counsel for both sides having waived argument, the Court will charge you without further ado, all of the testimony being in.

Members of the jury, the State of Florida by Information filed in this Court has charged the defendants, Connie Hoffman, also known as Connie Gonzalez, and Dewey McLaughlin, with the charge of a Negro man and white woman

habitually occupying the same room, charging in the body of the Information that Connie Hoffman, also known as Connie Gonzalez, and Dewey McLaughlin on the 23rd day of February, 1962 in the County and State aforesaid, the said Dewey McLaughlin being a Negro man and the said Connie Hoffman, also known as Connie Gonzalez, being a [fol. 159] white woman, who were not married to each other, have habitually lived and occupied in the nighttime in the same room in violation of 798.05, Florida Statutes, contrary to the form of the Statute in such cases made and provided and against the peace and dignity of the State of Florida.

To that Information the defendants entered their pleas of not guilty. This plea, or pleas, together with the Information, constitute the issues which you have to decide.

The Statute which the defendants are charged with having violated reads as follows:

"Any Negro man and white woman or any white man and Negro woman who are not married to each other who shall habitually live in and occupy in the nighttime the same room shall be guilty of a misdemeanor."

That is the gist of the Statute.

Another Statute of the State of Florida defines certain words as follows:

"The words 'Negro, colored, colored person, mulatto or persons of color' when applied to persons include every person having one-eighth or more of African or Negro blood."

I instruct you that the elements of the crime charged in [fol. 160] this case and which must be proved to you beyond and beyond the exclusion of every reasonable doubt are as follows: That one defendant, in this case has at least one-eighth Negro blood, and that the other defendant has more than seven-eighths white blood; two, that defendants have habitually or did habitually live in and occupy the same room during the nighttime and three, that defendants were not married to each other at the time of the alleged offense.

Now, members of the jury, "there has been in this case some mention of common-law marriage." I instruct you that there is in the State of Florida what is known as a common-law marriage which is as valid a marriage under our law as a marriage which has been solemnized formally. However, a common-law marriage is not a marriage of a lesser solemnity than a formal marriage, contrary to the beliefs of many laymen. A common-law marriage is just as strong as a formal marriage and it is necessary that the same conditions be complied with before a valid common-law marriage can be assumed.

To constitute a valid common-law marriage there must be an agreement to become husband and wife immediately [fol. 161] from the time when the mutual consent is given and an express future condition is absolutely fatal to a claim of marriage. A common-law marriage cannot be terminated except by death or divorce just like any other marriage. A common-law marriage cannot be entered into by parties who are already married to other persons, either common-law or otherwise.

The same instructions adhere as far as the blood relationship between the parties, if any, any racial restrictions, whether by law or any other restrictions set by law to a marriage between two persons.

I further instruct you that in the State of Florida it is unlawful for any white female person residing or being in this State to intermarry with any Negro male person and every marriage performed or solemnized in contravention of the above provision shall be utterly null and void.

The only possible valid marriage between such persons would be a marriage entered into in a State or country in which such marriage is legal, and the parties then come into the State of Florida.

Members of the jury, the defendants enter into the trial of this case clothed with a presumption of innocence. That presumption remains with them throughout the trial un- [fol. 162] less the State, if it can, overcomes that presumption and proves their guilt to your satisfaction to the exclusion of and beyond a reasonable doubt. To overcome this presumption and prove or establish guilt, it isn't sufficient to furnish a mere preponderance tending to prove

guilt, nor to prove a mere probability of guilt or suspicious circumstances, but proof of guilt to the exclusion of and beyond a reasonable doubt is indispensable.

The burden of such proof is on the State and it is to the evidence introduced upon the trial and to it alone that you are to look for such proof. The burden of proof is upon the State to prove all the material allegations of the Information to your satisfaction beyond a reasonable doubt, and if the State does that, it is your duty as jurors under your oath to find the defendants guilty, but if the State fails to do that then under your oaths as jurors you are to give the defendants the benefit of any reasonable doubt and acquit them.

By "reasonable doubt" is meant a real doubt arising from the evidence or lack of evidence in the case and not a mere fanciful or imaginary doubt, but one for which you can give your minds and consciences a satisfactory reason after considering all the facts and circumstances in the case.

[fol. 163] Having a reasonable doubt is that stage of the case which after a consideration of the entire testimony the jurors' minds are in that condition that they cannot say they feel an abiding conviction to a reasonable certainty of the truth of the charge.

You are the sole judges of the credibility of the witness and of the weight and credit to be given to their testimony. In determining that, you will look to all the facts and circumstances in the case, the witness' manner of testifying, their demeanor upon the witness stand, their intelligence, their bias or prejudice if the same should appear from the trial, their means and opportunity of knowing the facts about which they testify, their interest or lack of interest in the outcome of the case, the probability or improbability of their testimony and the reasonableness or unreasonableness of their testimony as judged by your common sense and everyday experience.

If there are any conflicts in the evidence you will reconcile those conflicts if you can without imputing perjury to any witness, but if you find conflicts which you cannot reconcile, take that testimony which you believe to be true and reject that testimony which you believe to be untrue, but

in any event, let your verdict speak the truth as you find it. [fol. 164] The defendants did not take the witness stand. Under the law of this State they have a right to refrain from taking the stand, and that is not to be considered by you either for or against the defendants.

The credibility of admissions, if any, made by the defendants is for the jury to determine. You are to determine the credence which should be attached to the alleged admissions and every part thereof. It is your duty to give such admissions a fair and unprejudiced consideration. The admissions should be considered as a whole. You should fairly consider the time and all the circumstances of their making, their harmony or inconsistency in themselves or with the other evidence in the case and the motives which may have operated on the parties in making them.

Admissions should be received, considered and weighed by you with great care and caution, but if you find in fact that the defendants or either of them made confessions or admissions freely and voluntarily, you will then give effect to such part thereof as you find sufficient reason to credit and reject that which you find sufficient reason to disbelieve.

You are to determine the credence which should be attached to the alleged admissions and every part thereof. [fol. 165] and again I repeat the instructions I have given you previously that any admissions made by one defendant cannot be held against the other defendant but only against the defendant who made such admission, if any.

During the course of the trial various rulings have been made by the Court. From these rulings or from anything that has occurred during the trial, you are not to infer what the opinion of the Court may be as to the guilt or innocence of the accused.

The question of the guilt or innocence of the defendants is for you alone to decide. The Court makes no suggestion to you as to what has or has not been proven. That is a matter of fact solely within the province of the jury. You should confine your deliberations solely to the evidence which has been presented.

You should not be swayed by sympathy for the defendants nor by prejudice against them because of the type

of charge or for any other reason. You are not to concern yourselves with the penalty that may be imposed if the defendants are found guilty; that is the duty and responsibility of the Court.

You will be handed two verdict forms, one for each defendant and you shall consider and complete these forms [fol. 166] as to each defendant independently. Each verdict form commences a sentence with the words "We, the jury"—then "in Dade County, Florida" and then "find the defendant" and it names the defendant. You will complete each sentence with the word "guilty" or "not guilty" as you find your verdict to be as to each defendant.

Upon entering the jury room you will select a foreman to represent you and that foreman will complete the verdict forms and sign his name on the bottom line indicated for a foreman's signature. Each and every verdict you return must be the unanimous verdict of all six of you.

You will now retire to consider your verdict.

(Thereupon at 4:26 P.M. the jury retired and returned to the Courtroom at 4:50 P.M.)

VERDICTS OF JURY

The Court: Members of the jury, have you arrived at a verdict?

The Foreman: We have, your Honor.

The Court: Hand them to the Clerk.

The Clerk: In the Criminal Court of Record in and for Dade County, Florida, State of Florida vs. Connie Hoffman, also known as Connie Gonzalez, Case No. 62-1385-A. Verdict: We the jury at Miami, Dade County, Florida this 24th day of June 1962 find the defendant Connie Hoffman also known as Connie Gonzalez guilty. So say we all. Lauren S. Seabold, Foreman.

[fol. 167] In the Criminal Court of Record in and for Dade County, Florida, State of Florida vs. Dewey McLaughlin, Case No. 62-1385-B. Verdict: We the jury at Miami, Dade County, Florida, this 24th day of June 1962 find the defendant Dewey McLaughlin guilty. So say we all. Lauren S. Seabold, Foreman.

The Court: Anything on behalf of the defendants before sentence is passed.

Mr. Graves: We have nothing to say, may it please the Court.

SENTENCING OF DEFENDANTS

The Court: Each defendant sentenced to serve thirty days in the county jail and pay a fine of \$150.00 or in lieu thereof an additional thirty days.

(Thereupon the trial was concluded.)

[fol. 168] Certificate of Court Reporter (omitted in printing).

[fol. 169] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 185]

[File-endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CONNIE HOFFMAN also known as CONNIE GONZALEZ and
DEWEY McLAUGHLIN, Defendants-Appellants,

vs.

THE STATE OF FLORIDA, Plaintiff-Appellee.

APPLICATION FOR ORAL ARGUMENT—Filed December 10, 1962

To: The Honorable Justices of the Supreme Court of the State of Florida

The appellants at the time of filing of their main brief respectfully apply to the Court pursuant to the Rules to designate a day for oral argument in due time and to notify the parties thereof.

Robert Ramer, 3041 N. W. Seventh Street, Miami, Florida.

H. L. Braynon, 802 N. W. Second Avenue, Miami,
Florida,

G. E. Graves, Jr., 802 N. W. Second Avenue, Miami,
Florida, Attorneys for Appellants, By G. E.
Graves, Jr., Of Counsel.

Certificate of service (omitted in printing).

[Vol. 202]

Not Final Until Time Expires to File Rehearing Petition
and, If Filed, Determined.

IN THE SUPREME COURT OF FLORIDA

January Term, A. D. 1963

Case No. 31,906

DEWEY McLAUGHLIN and CONNIE HOFFMAN also known as
CONNIE GONZALEZ, Appellants,

vs.

STATE OF FLORIDA, Appellees.

An Appeal from the Criminal Court of Record for Dade
County, Gene Williams, Judge

Robert Ramer, H. L. Braynon and G. E. Graves, for Ap-
pellants

Richard W. Ervin, Attorney General, and James G. Mahor-
ner, Assistant Attorney General, for Appellees

OPINION—Filed May 1, 1963

CALDWELL, J.

This cause is here on appeal from the Criminal Court of
Record of Dade County. The trial court directly passed
upon the validity of a State statute and we, therefore, have
jurisdiction.

Defendants are charged with having violated Fla. Stat. §798.05¹ in that "the said Dewey McLaughlin, being a negro [fol. 203] man, and the said Connie Hoffman, being a white woman, who were not married to each other did habitually live in and occupy in the nighttime the same room." The defendants moved to quash the information on the ground that the aforesaid statute was in violation of the Federal and State Constitutions. The motions were denied. Defendants were then arraigned and entered pleas of not guilty. The jury trial terminated in a verdict of guilty, a sentence of thirty days in the county jail and a fine of \$150 for each defendant.

The defendants contend they were denied equal protection of the laws because "Firstly, the law provides a special criminal prohibition on cohabitation solely for persons who are of different races; or, secondly, if this special statute is equated with the general fornication statute, the higher penalties are imposed on the person whose races differ than would be applicable to persons of the same race who commit the same acts."

In *Pace vs. Alabama*,² the Supreme Court of the United States upheld an Alabama Statute³ prohibiting interracial marriage, adultery or fornication, against the contention that it denied equal protection of the law. Another Alabama Statute⁴ prohibited adultery or fornication between members of the same race but provided a less severe maximum penalty. The Supreme Court speaking through Mr. Justice Field held:

¹ Fla. Stat. §798.05

"Any negro man and white woman, or any white man and negro woman, who are not married to each other, who shall habitually live in and occupy in the nighttime the same room shall be punished by imprisonment not exceeding twelve months, or by fine not exceeding five hundred dollars."

² 106 U. S. 207 (1883).

³ Ala. Code of 1876, §4189 (now Ala. Code, Title 14, §360 [1958]).

⁴ Ala. Code of 1876, §4184 (now Ala. Code, Title 14, §16 [1958]).

"Equality of protection under the laws implies not only accessibility by each one, whatever, his race, on the same terms with others, to the courts of the country for the security of his person and property, but that in the administration of criminal justice he shall not be subjected, for the same offense, to any greater or different punishment . . .

[fol. 204] "The defect in the argument of counsel, consists in his assumption that any discrimination is made by the laws of Alabama in the punishment (sic) provided for the offense for which the plaintiff in error was indicted, when committed by a person of the African race and when committed by a white person. The two sections of the Code cited are entirely consistent. The one prescribes, generally, a punishment for an offense committed between persons of different sexes; the other prescribes punishment for an offense which can only be committed where the two sexes are of different races. There is in neither section any discrimination against either race. Section 4184 equally includes the offense when the persons of the two sexes are both white and when they are both black. Section 4189 applies the same punishment to both offenders, the white and the black. Indeed, the offense against which this latter section is aimed cannot be committed without involving the persons of both races in the same punishment. Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same."

The appellants seek adjudication of their right to engage in integrated illicit cohabitation upon the same terms as are imposed upon the segregated lapse. But, as was admitted by counsel in argument, this appeal is a mere way station [fol. 205] on the route to the United States Supreme Court where defendants hope that, in the light of supposed social and political advances, they may find legal endorsement of their ambitions.

This Court is obligated by the sound rule of stare decisis and the precedent of the well written decision in Pace, supra. The Federal Constitution, as it was when construed by the United States Supreme Court in that case, is quite adequate but if the new-found concept of "social justice" has out-dated "the law of the land" as therein announced and, by way of consequence, some new law is necessary, it must be enacted by legislative process or some other court must write it.

Affirmed.

Roberts, C.J., Terrell, Thomas, Thorne and O'Connell, JJ., concurring

Drew, J., agrees to judgment

[fol. 207]

[File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF FLORIDA.

January Term, A. D. 1963

Case No. 31,906

[Title omitted]

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Drew

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PETITION FOR REHEARING—Filed May 9, 1963

Come now the defendants by their attorneys of record and petition the Court for a rehearing in the above styled cause and assign as grounds therefore:

1.

The Court in its opinion did not pass upon the question of the allowance of the defense of marriage between the parties which was raised in their motion for a new trial in the court below.

2.

The Court relied solely in its opinion upon the dictum of the United States Supreme Court in *Pace v. Alabama*, 106 U.S. 207, thus overlooking subsequent decisions of the Supreme Court of the United States which seemingly reject the reasoning in the said case. These subsequent decisions are:

Sipuel vs. Oklahoma State Regents, 339 U.S. 637

Sweatt v. Painter, 339 U.S. 629

Brown v. Board of Education, 347 U.S. 483

Bolling v. Sharpe, 347 U.S. 497

Shelley v. Kraemer, 334 U.S. 1

Yick Wo v. Hopkins, 118 U.S. 356

Carter v. Texas, 177 U.S. 442

Buchanan v. Warley, 245 U.S. 601

Nixon v. Herndon, 273 U.S. 576

Edwards v. California, 314 U.S. 160

Gibson v. Mississippi, 152 U.S. 565

Strauder v. West Virginia, 100 U.S. 303

G. E. Graves, Jr., 802 N.W. Second Avenue, Miami,
Florida,

and

H. L. Braynon, 802 N.W. Second Avenue, Miami,
Florida, By G. E. Graves, Jr., Of Counsel for Ap-
pellants.

[fol. 210]

IN THE SUPREME COURT OF THE STATE OF FLORIDA

[Title omitted]

REPLY TO PETITION FOR REHEARING—Filed May 11, 1963

Comes now the appellee, the State of Florida, and files the following in reply to the petition for rehearing submitted to this court by the appellants.

I.

The petition for rehearing urges that the court correct its former opinion as to pass upon the allowance of the defense of marriage between the parties.

II.

It is submitted that there are adequate state grounds on which to rule that the trial court did not commit reversible error in instructing the jury that the defendants could not legally marry in the state of Florida. The United States [fol. 211] Supreme Court pointed out in the case of *Durley v. Mayo*, 100 L.Ed 1178, that such court did not review the federal constitutional questions which may have been present in that particular case where there were adequate state grounds to support the holding to which such federal constitutional questions were applicable.

In the instant case, as pointed out on pages 8 and 9 of appellee's brief, there was no evidence which would tend to support the existence of a marriage in this state between the defendants. In fact, as pointed out on pages 8 and 9 of appellee's brief, there was ample evidence from which the jury could conclude that the defendants were not married to each other.

III.

Furthermore, the defendants failed to assign as error the judge's instructing the jury that a marriage between the defendants in the state of Florida would be illegal and void. As is stated in the case of *Mortellaro v. State*, 72 So. 2d 815, a court will generally not consider an error

unless it is the basis of an assignment of error. The assignment of error that the court erred in overruling and denying defendants' motion for new trial is insufficient to support a reversal on the ground that the instruction to the [fol. 212] jury was erroneous. *Green v. State*, 163 So. 712, 121 Fla. 307.

It Is Therefore Submitted that the existing state grounds are such as to make the instant case an improper vehicle on which to test the federal constitutionality of the Florida miscegenation provisions of the Florida constitution. This court, in order to clarify such proposition, is therefore urged to set forth the state grounds for not reversing on the trial judge's instruction relating to the marriage of the defendants, if the court determined such state grounds to be adequate.

Respectfully submitted,

Richard W. Ervin, Attorney General, James G. Mahorner, Assistant Attorney General, Counsel for Appellee.

Certificate of service (omitted in printing).

[fol. 213]

IN THE SUPREME COURT OF THE STATE OF FLORIDA

January Term A. D. 1963

Case No. 31,906

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—May 30, 1963

On consideration of the Petition for Rehearing filed by Attorneys for Appellants,

It Is Ordered by the Court that the said petition be, and the same is hereby, denied.

(The Mandate From This Court Has Today Been Issued and Mailed to the Clerk of the Criminal Court of Record for Dade County)

[fol. 215]

[File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF FLORIDA

Case No. 31,906

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—Filed August 29, 1963

I. Notice is hereby given that Dewey McLaughlin and Connie Hoffman, also known as Connie Gonzalez, the appellants above named, hereby appeal to the Supreme Court of the United States from the final order of the Supreme Court of Florida entered in this action on May 30, 1963, denying appellants petition for rehearing and affirming the judgments of conviction.

This appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

Appellants were convicted of the crime of being a Negro man and white woman not married to each other, who habitually lived in and occupied the same room in the nighttime, in violation of Section 798.05 of the Florida Statutes; appellants each received a sentence of thirty (30) days in the county jail and a fine of one hundred and fifty dollars (\$150.00) and in default thereof an additional thirty (30) days at hard labor. Execution of the sentence was stayed by the Criminal Court of Record of Dade County pending disposition of the appeal to the Supreme Court of the United States.

II. The Clerk will please prepare a transcript of the [fol. 216] entire record in this cause, for transmission to the Clerk of the Supreme Court of the United States.

III. The following questions are presented by this appeal:

Does a conviction deny appellants equal protection of the laws and due process of law under the Fourteenth Amendment to the United States Constitution where:

1. the race of the appellants are necessary elements under the statute defining the alleged crime.
2. the appellants, solely because they differ in race, have their acts subjected to criminal penalties when the same behavior by persons of the same race are not subjected to criminal prohibition.
3. appellants, solely because their race differs, are subjected to a higher maximum penalty under Section 798.05 of the Florida statutes than would be applicable to persons of the same race under Section 798.03 of the Florida statutes, a similar anti-fornication statute.
4. marriage of the parties is a complete defense to the crime charged and such defense is unavailable to the appellants solely because the state laws of Florida prohibit marriage between Negroes and whites.
5. Section 798.05 of the Florida statutes in conjunction with Section 741.11 prohibiting marriage between Negroes and whites in Florida authorizes invasion of [fol. 217] appellants' right to privacy and right to marry.
6. appellants are deprived of fair trial and an opportunity to defend because essential elements of the crime—identification of appellants as "Negro" and "white" are vague and undefined in the statute and the information under which appellants were convicted and no ascertainable standard was utilized at trial to prove these elements of the crime.

Attorneys for Appellants.

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Robert Ramer, 305 N. W. 27 Avenue, Miami, Florida.

H. L. Braynon, 802 N. W. Second Avenue, Miami, Florida.

Jack Greenberg, Leroy D. Clark, 10 Columbus Circle, New York 19, New York.

Certificate of service (omitted in printing).

[fol. 219] Clerk's Certificate to foregoing transcript
(omitted in printing).

[fol. 220]

SUPREME COURT OF THE UNITED STATES
No. 585, October Term, 1963

DEWEY McLAUGHLIN, et al., Appellants,

vs.

FLORIDA.

ORDER NOTING PROBABLE JURISDICTION—April 27, 1964

Appeal from the Supreme Court of the State of Florida.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1963

No. ~~100~~ //

DEWEY McLAUGHLIN and CONNIE HOFFMAN,
also known as CONNIE GONZALEZ,

Appellants,

—v.—

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF FLORIDA

JURISDICTIONAL STATEMENT

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Of Counsel

INDEX

	PAGE
Citation to Opinion Below	2
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Questions Presented	4
Statement	4
How The Federal Questions Were Raised and Decided ..	6
The Questions Presented Are Substantial	9
I. The Court Below Affirmed Racially Discrimina- tory Criminal Convictions Under an Expressly Racial Statute in Mistaken Reliance Upon <i>Pace</i> v. <i>Alabama</i> , 106 U. S. 583. However, if <i>Pace</i> Is Deemed Controlling, It Should No Longer Be Followed Because It Is Inconsistent With Many Subsequent Decisions of This Court	9
II. Appellants' Conviction Denied Them Due Proc- ess and Equal Protection of the Laws Under the Fourteenth Amendment in That a Com- mon Law Marriage Was Held to Be Unavail- able as a Defense to the Crime Because of a Florida Law Declaring Interracial Marriages Null and Void	13
III. Appellants Were Denied Due Process of Law Under the Fourteenth Amendment Because the Statute Under Which They Were Convicted Was Vague and Indefinite	16
CONCLUSION	19

	PAGE
APPENDIX	1a
Opinion Below	1a
Final Judgment Denying Rehearing	5a

TABLE OF CASES

Abington School District v. Schempp, 374 U. S. 203	11
Bolling v. Sharpe, 347 U. S. 497	15
Brown v. Board of Education, 347 U. S. 483	11
Buchanan v. Warley, 245 U. S. 60	10, 12, 14
Chaachow v. Chaachow, 73 So. 2d 830 (1954)	13
Dorsey v. State Athletic Commission, 168 F. Supp. 149 (E. D. La. 1958)	11
Edwards v. California, 314 U. S. 160	11
Gayle v. Browder, 352 U. S. 903, aff'g 142 F. Supp. 707 (M. D. Ala. 1956)	11
Gibson v. Mississippi, 162 U. S. 565	10
Goss v. Board of Education, 373 U. S. 683	11
Hill v. U. S. ex rel. Weiner, 300 U. S. 105	12
Holmes v. Atlanta, 350 U. S. 879, rev'g 223 F. 2d 93 (5th Cir. 1955)	11
Jackson v. Alabama, 348 U. S. 888	14
Lanzetta v. New Jersey, 306 U. S. 451	18
Largent v. Texas, 318 U. S. 418	2
Louisiana v. NAACP, 366 U. S. 293	17

	PAGE
Mapp v. Ohio, 367 U. S. 643	15
Maynard v. Hill, 125 U. S. 190	15
Meyer v. Nebraska, 262 U. S. 390	15
Moore v. Missouri, 159 U. S. 673	12
NAACP v. Alabama, 357 U. S. 449	16
Naim v. Naim, 350 U. S. 891 (1955), app. dism. 350 U. S. 985	14
Navarro v. Baker, 54 So. 2d 59 (1951)	13
Pace v. Alabama, 106 U. S. 583 (1883)	7, 8, 9, 11, 12, 14
Peréz v. Lippold, 32 Cal. 2d 711, 198 P. 2d 17 (1948)	14
Peterson v. Greenville, 373 U. S. 244	10
Plessy v. Ferguson, 163 U. S. 537	11
Poe v. Ullman, 367 U. S. 497	15
Public Utilities Commission v. Pollak, 343 U. S. 451	15
Reynolds v. United States, 98 U. S. 145	15
Robinson v. California, 370 U. S. 660	10
Shelley v. Kraemer, 334 U. S. 1	12
Williams v. Bruffy, 96 U. S. 176	2
<i>Statutes Involved:</i>	
Ala. Code, tit. 14, §360	12
Ark. Stats. Ann. §41-806	12
Fla. Stat. Ann. §1.01(6)	3, 4, 16, 18
Fla. Stat. Ann. §741.11	3, 13
Fla. Stat. Ann. §798.03	12

	PAGE
Fla. Stat. Ann. §798.04	11
Fla. Stat. Ann. §798.05	2, 4, 5, 7, 9, 10, 13, 16
La. Rev. Stats. §14:79	12
Nev. Rev. Stats. ch. 201.240	12
N. Dak. Rev. Code ch. 12-2213	12
S. C. Code 1952, §5377	11
Tenn. Code Ann. §36-402 (1955)	12

Other Authorities:

Greenberg, Race Relations and American Law (1959)	14
Hager, "Some Observations on the Relationship Between Genetics and Social Science," 13 Psychiatry 371 (1950)	17
Weinberger, A Reappraisal of the Constitutionality of Miscegenation Statutes, 42 Cornell L. Q. 208 (1957)	14, 17

IN THE
Supreme Court of the United States

OCTOBER TERM, 1963

No.

DEWEY McLAUGHLIN and CONNIE HOFFMAN,
also known as CONNIE GONZALEZ,

Appellants,

—v.—

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF FLORIDA

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Florida which affirmed, on May 1, 1963, the judgments of conviction entered by the criminal court of record of Dade County, Florida. The final order of the Supreme Court of Florida was entered May 30, 1963 with denial of appellants' petition for rehearing (R. 213). Appellants submit this statement to show that this Court has jurisdiction of the appeal and that a substantial question is presented. In the alternative, should the Court regard this appeal as having been improvidently taken, appellants pray that this statement be regarded and acted upon as a petition for a writ of certiorari in accordance with 28 U. S. C. §2103.

Citation to Opinion Below

The criminal court of record of Dade County, Florida did not render an opinion. The opinion of the Supreme Court of Florida is reported in 153 So. 2d 1 (1963) and is printed in the appendix hereto, *infra*, pp.

Jurisdiction

Appellants were convicted in the criminal court of record of Dade County, Florida on June 24, 1962 of violating Fla. Stat. Anno. §798.05. They appealed to the Supreme Court of Florida contending that the convictions violated the equal protection and due process clauses of the Fourteenth Amendment. On May 1, 1963, the Supreme Court of Florida affirmed the convictions and decided in favor of the validity of §798.05 under the Constitution of the United States (R. 202). Petition for rehearing in the Supreme Court of Florida was denied May 30, 1963 (R. 213).

Appellants filed Notice of Appeal in the Supreme Court of Florida on August 29, 1963 (R. 215). Jurisdiction of this Court on appeal rests upon 28 U. S. C. §1257 (2); *Williams v. Bruffy*, 96 U. S. 176; *Largent v. Texas*, 318 U. S. 418.

Constitutional and Statutory Provisions Involved

1. Petitioners were convicted of violating Fla. Stat. Anno. §798.05 (Volume 22, Title 44, p. 227), which provides:

§798.05—Negro man and white woman or white man and negro woman occupying same room.

“Any negro man and white woman, or any white man and negro woman, who are not married to each other,

who shall habitually live in and occupy in the night-time the same room shall be punished by imprisonment not exceeding twelve months, or by fine not exceeding five hundred dollars."

2. The case also involves Fla. Stat. Anno. §741.11¹ (Vol. 21, Title 42, p. 330) which provides:

§741.11—Marriages between white and negro persons prohibited.

It is unlawful for any white male person residing or being in this state to intermarry with any negro female person; and it is in like manner unlawful for any white female person residing or being in this state to intermarry with any negro male person; and every marriage formed or solemnized in contravention of the provisions of this section shall be utterly null and void, and the issue, if any, of such surreptitious marriage shall be regarded as bastard and incapable of having or receiving an estate, real, personal or mixed, by inheritance.

3. The case also involves Fla. Stat. Anno. §1.01 (Vol. 1, Title 1, p. 124) providing:

§1.01—Definitions.

... (6) The words "negro", "colored", "colored persons", "mulatto" or "persons of color", when applied to persons, include every person having one-eighth or more of African or negro blood.

4. This case also involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

¹ Petitioners were not charged under this law.

Questions Presented

Do these convictions violate the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution where:

(1) The State has (by Fla. Stat. Anno. §798.05) created a crime expressly defined in terms of race which punishes Negroes and whites who engage in certain conduct together, but does not forbid such conduct engaged in by Negroes only or whites only?

(2) Common law marriage is a defense for a couple charged under Fla. Stat. Anno. §798.05 but was unavailable to appellants because Fla. Stat. Anno. §741.11 prohibits marriage between Negroes and whites?

(3) Florida's purported definition of "Negro" and "white" persons in Fla. Stat. Anno. §1.01—an essential element of the crime created by Fla. Stat. Anno. §798.05—is so vague and indefinite as applied as to afford no fair warning to appellants or standard of criminality for the court or the jury?

Statement

Appellants were arrested in February 1962 and charged with having violated Fla. Stat. Anno. §798.05 in that "the said Dewey McLaughlin, being a Negro man, and the said Connie Hoffman, also known as Connie Gonzalez, being a white woman, who were not married to each other, did habitually live in and occupy in the nighttime the same room" (R. 10). Mr. McLaughlin, a Spanish-speaking man born in Honduras (but apparently a U. S. citizen) was employed in a Miami Beach hotel (R. 140). Appellant Connie Hoffman began residing in a one room apartment

at 732 Second Street, Miami Beach, Florida in April 1961 (R. 37). The owner of the premises, Mrs. Dora Goodnick, testified that she saw McLaughlin at various times in December 1961 and February 1962 enter the apartment house at night and leave in the morning (R. 38-40). Mrs. Goodnick also claimed to have seen him showering in the bathroom and heard him talking to appellant Hoffman in her apartment at night (R. 50-52). Appellant Hoffman told Mrs. Goodnick that McLaughlin was her husband (R. 38). Mrs. Goodnick stated that she was disturbed that a colored man was living in her house and consequently reported the situation to the police (R. 39).

Detectives Stanley Marcus and Nicolas Valeriana of the Miami Beach Police Department went to appellant Hoffman's apartment at 7:15 P.M. February 23, 1962, to investigate a charge that she was contributing to the delinquency of her minor son (R. 60, 75). They knocked at the door and a man's voice answered, "Connie, come in," but the door was not opened (R. 61-62). Valeriana went to the back of the apartment and found McLaughlin exiting from the rear door (R. 70). In the questioning which followed, McLaughlin admitted that he had been living there with Hoffman (R. 73) and that on at least one occasion he had had sexual relations with her (R. 80). But, there was no charge or conviction of fornication or adultery. The detectives also observed pieces of McLaughlin's wearing apparel draped across furniture in the room (R. 77). Appellant Hoffman came to the police station where McLaughlin was being held and while there stated that she was living with him but thought that this was not unlawful (R. 82). At trial Detective Valeriana identified her as a white woman and Dewey McLaughlin as a Negro from their appearances (R. 100-101, 103).

Josephine De Cesare, a secretary in the City Manager's Office, testified that in the process of securing a civilian

registration card, McLaughlin stated in January 1961, that he "was separated and that his wife's name was Willie McLaughlin" (R. 125, 127). Dorothy Kaabe, a child welfare worker in the Florida State Department of Public Welfare testified that in an interview on March 5, 1962, appellant Hoffman stated that she began living with McLaughlin as her common law husband in September or October 1961 but had never had a formal marriage to him (R. 143).

Each defendant was convicted by a jury and each was sentenced to thirty days in the County Jail at hard labor and fined \$150.00, plus costs, and in default of such payment to an additional 30 day term (R. 14-17).

How the Federal Questions Were Raised and Decided

On March 1, 1963, an information was filed against appellants charging them with violation of Fla. Stat. Anno. §798.05 (R. 10). They filed a motion to quash the information alleging that §798.05 was contrary to the Fourteenth Amendment of the United States Constitution in that it was vague, denied due process and equal protection of the laws, and was an invasion of the right to privacy (R. 12-13). The Motion to Quash was denied (R. 14). During trial, appellants moved for directed verdict on the grounds that criteria for identifying a "Negro" under §798.05 must be established by reference to Fla. Stat. Anno. §1.01 and that the standard of proof of this element was vague, in terms of evidence introduced by the state and as set forth in §1.01 (R. 104-108, 152). Appellants specifically related the motion for directed verdict to the unconstitutional vagueness of §798.05 (R. 104-105), asserting that no one could be apprised that his behavior was prohibited given the unclear definition of the term

"Negro" (R. 104-105). The motion for directed verdict was denied (R. 108, 152).

Upon submitting the case to the jury, the judge gave instructions that in Florida a Negro and a white person could not have lawfully married, either by common law or formal ceremony (R. 161). No exception was taken to this instruction at the trial.

On July 3, 1962, defendants filed a motion for new trial on the grounds that the court erred in overruling the motion to quash the information which had alleged that \$798.05 was contrary to the Fourteenth Amendment. Error was also claimed in that the trial court had permitted the testimony of Detective Valeriana, based on his observation of the appearance of appellant McLaughlin, to satisfy the statutory criteria defining the term "Negro" (R. 17-18). The motion for new trial was denied (R. 19).

On appeal the assignment of errors again alleged that Fla. Stat. Anno. §798.05 violated the Fourteenth Amendment of the United States Constitution in that it was vague and indefinite, operated to deny equal protection and due process of law, and authorized an undue invasion of the right of privacy (R. 21-22). Error was also assigned to the overruling of the motion for new trial and to the overruling of the objection to the standard of proof accepted for the identification of appellant McLaughlin as a Negro (R. 22).

In affirming the conviction, the Supreme Court of Florida discussed only whether the special crime of interracial cohabitation was valid under the Fourteenth Amendment, and sustained the law relying on *Pace v. Alabama*, 106 U. S. 583. The court stated:

This cause is here on appeal from the Criminal Court of Record of Dade County. The trial court di-

rectly passed upon the validity of a State statute and we, therefore, have jurisdiction . . . (R. 202).

. . .

The appellants seek adjudication of their right to engage in integrated illicit cohabitation upon the same terms as are imposed upon the segregated lapse. But, as was admitted by counsel in argument, this appeal is a mere way station on the route to the United States Supreme Court where defendants hope that, in the light of supposed social and political advances, they may find legal endorsement of their ambitions.

This Court is obligated by the sound rule of stare decisis and the precedent of the well written decision in *Pace*, supra. The Federal Constitution, as it was when construed by the United States Supreme Court in that case, *Pace v. Alabama* is quite adequate but if the new-found concept of "social justice" has outdated "the law of the land" as therein announced and, by way of consequence, some new law is necessary, it must be enacted by legislative process or some other court must write it (R. 204-205).

Appellants' brief in the Florida Supreme Court argued that the instruction of the jury in accordance with the miscegenation law violated their rights (R. 180-183). The state countered by arguing that the law was valid under the Fourteenth Amendment and that the instruction could only be a harmless error (R. 195-199). Appellants sought rehearing attempting to secure the Florida Supreme Court's discussion of this issue (R. 207), but rehearing was denied without opinion (R. 213).

The Questions Presented Are Substantial

I

The Court Below Affirmed Racially Discriminatory Criminal Convictions Under an Expressly Racial Statute in Mistaken Reliance Upon *Pace v. Alabama*, 106 U. S. 583. However, if *Pace* Is Deemed Controlling, It Should No Longer Be Followed Because It Is Inconsistent With Many Subsequent Decisions of This Court.

This case presents a substantial question deserving preliminary hearing before this Court on appeal. The conviction of appellants represents a manifest discrimination, erroneously sought to be justified by the court below as compelled by *Pace v. Alabama*, 106 U. S. 583 (1883), a case involving a discrete issue. Tony Pace and his co-defendant would have been guilty of a crime in Alabama even if they had both been white—though, to be sure, their punishment would have been less.

However, if Dewey McLaughlin and Connie Hoffman had been found by the jury to be both white or both Negroes they would have been set free. But for their race (as determined by the jury) no crime would have been committed under §798.05. This law makes it a crime punishable by 12 months in jail and a \$500 fine for an unmarried man and woman habitually to live in and occupy the same room in the nighttime, if (and *only* if) one is a Negro and the other is white. Unlike the Alabama situation in *Pace v. Alabama*, 106 U. S. 583, Florida has *not* made it a crime at all for a man and woman of the same race to engage in the identical conduct charged. There is no general nonracial (or single-racial) counterpart of §798.05 in the Florida statutes. Florida recognizes common law marriages (see *infra* p. 13).

Thus, the conduct with which appellants were charged is licit under Florida law for persons of the same race.

Conviction under this law involves so gross a denial of equal protection as to command the attention of the Court. Stripped of emotional overtones, the case is simple indeed. Who would doubt that the equal protection clause would invalidate a scheme of laws providing that it was a crime for automobiles occupied by Negroes and whites to exceed 25 m.p.h. but providing no speed limit for any other automobiles. Such a legal scheme—and innumerable hypothetical parallels—would probably be laughed out of court with dispatch. But our hypothesized speeding law shares the same infirmity as §798.05 does—it punishes an activity only if and because it is interracial.

Florida has not advanced (and cannot advance) any constitutionally acceptable basis for making the conduct described by §798.05 a crime only when persons of different races are involved.²

As early as 1896, this Court said that criminal justice must be administered "without reference to considerations based on race," *Gibson v. Mississippi*, 162 U. S. 565, 591. From *Buchanan v. Warley*, 245 U. S. 60 to *Peterson v. Greenville*, 373 U. S. 244, the Court has repeatedly struck down laws attempting to require separation of the races by imposing criminal penalties. Such a law was involved in

² Of course, the State's power to regulate sexual immorality is not challenged. But this law does not require any proof of sexual or other misconduct; it merely regulates who occupies a room. There is some reason to doubt whether, aside from the racial dimensions of the law, Florida can justify punishing this conduct. Cf. *Robinson v. California*, 370 U. S. 660. In numerous situations such a nonracial statute would not seem justified; its coverage would include such cases as unmarried members of the same family occupying a room, nurses and patients, the physically handicapped, etc.

Dorsey v. State Athletic Commission, 168 F. Supp. 149 (E. D. La. 1958), affirmed 359 U. S. 533, where Louisiana made it a crime punishable by a year in jail for a Negro and a white person to engage in boxing matches and other athletic contests. No one contested Louisiana's power to prohibit boxing; that State was denied the power to allow it generally but prohibit interracial contests. Many comparable laws have been invalidated. For example, desegregated golf matches were criminally punishable by the law struck down in *Holmes v. Atlanta*, 350 U. S. 879, reversing 223 F. 2d 93 (5th Cir. 1955), and South Carolina's school segregation law (S. C. Code 1952, §5377) merely made it a crime for any person to attend a school established for persons of another race. *Brown v. Board of Education*, 347 U. S. 483. See also *Gayle v. Browder*, 352 U. S. 903, aff'g 142 F. Supp. 707 (M. D. Ala. 1956).

In short, "race is constitutionally an irrelevance" (*Edwards v. California*, 314 U. S. 160, 185), and "racial differences cannot provide a valid basis for governmental action" (*Abington School District v. Schempp*, 374 U. S. 203, 10 L. ed. 2d 844, 912, Justice Stewart dissenting). See also, *Goss v. Board of Education*, 373 U. S. 683, 10 L. ed. 2d 632, 635, and cases cited. In the words of the first Justice Harlan, the Constitution is "color blind," *Plessy v. Ferguson*, 163 U. S. 537, 558. The decision below is in the teeth of this Court's repeated holdings that racial segregation laws are invalid.

As noted above, this case is different from *Pace v. Alabama*, *supra*, where the conduct alleged was criminal irrespective of the race of the parties. Appellants were not charged with violating Fla. Stat. Anno. §798.04, prohibiting interracial fornication; if they had been the case would be like *Pace*, for the non-racial law covering the same conduct

(Fla. Stat. §798.03) carries a lesser penalty.³ But appellants have no hesitancy in urging that *Pace* should be overruled if its reasoning—that interracial illicit conduct is a “different crime” from that punished by the general law—is thought to extend to this case. *Pace* stands as an isolated vestige of the “separate but equal” era inconsistent with the entire development of the law at least since *Buchanan v. Warley*, 245 U. S. 60. It is notable that this Court has cited *Pace* only two times in the eighty years since it was decided; race discrimination was not an issue in either case.⁴ It ought to be overruled. No segregation law would ever be invalidated under the reasoning of *Pace* that equality is assured where a Negro and white co-defendant are liable to the same punishment. Cf. *Shelley v. Kraemer*, 334 U. S. 1, 22.

The issue involved here is not confined to Florida; at least six other states have laws similar to §798.05.⁵

3 If this case is viewed as presenting the *Pace* issue, the following facts would be pertinent. Appellants were fined \$150 and given a 30 day jail term. (They were liable under §798.05 to a \$500 fine and a 12 month term.) The maximum sentence under the general fornication law (§798.03) is a \$30 fine and a 3 months term. The interracial fornication and adultery law (§798.04) carries a possible \$1,000 fine and 12 months in jail.

4 See e.g. *Moore v. Missouri*, 159 U. S. 673, 678 (1895); *Hill v. United States ex rel. Weiner*, 300 U. S. 105, 109 (1937).

5 Ala. Code tit. 14, §360 (adultery, marriage, or fornication between white and Negro, 2 to 7 years); Ark. Stats. Ann. §41-806 (concubinage between white and Negro, 1 month to 1 year); La. Rev. Stats. §14:79 (miscegenation statute includes habitual cohabitation of racially mixed couple; up to 5 years); Nev. Rev. Stats. ch. 201.240 (white and colored persons living and cohabiting in state of fornication, \$100 to \$500, 6 months to 1 year, or both); N. Dak. Rev. Code ch. 12-2213 (unmarried racially mixed couple occupying same room; up to 1 year, \$500 fine, or both); Tenn. Code Ann. §36-402 (1955) (marriage or living together as man and wife of racially mixed couple prohibited; 1 to 5 years or fine and imprisonment in county jail).

II

Appellants' Conviction Denied Them Due Process and Equal Protection of the Laws Under the Fourteenth Amendment in That a Common Law Marriage Was Held to Be Unavailable as a Defense to the Crime Because of a Florida Law Declaring Interracial Marriages Null and Void.

In charging the jury the judge stated (R. 161):

"I further instruct you that in the State of Florida it is unlawful for any white female person residing or being in this state to intermarry with any Negro male person and every marriage performed or solemnized in contravention of the above provision shall be utterly null and void."

This charge was in accord with Fla. Stat. Anno. §741.11. The statute under which appellants were prosecuted (§798.05) makes marriage a defense to the charge, and Florida gives full recognition to common law marriage, according it the same legal incidents available in a formal marriage. (See, e.g., *Chaachow v. Chaachow*, 73 So. 2d 830 (1954); *Navarro v. Baker*, 54 So. 2d 59 (1951).) Of course, one of the ways of proving common law marriage is by "repute" and there was evidence of representations by appellant that McLaughlin was her husband (R: 38, 143). But the sufficiency of the evidence is not in issue because the judge's charge, based on Fla. Stat. Anno. §741.11, removed from the jury's consideration any evidence tending to establish the defense of marriage if they found that one appellant was Negro and that the other was white.

The constitutionality of the anti-miscegenation statute (§741.11) is relevant because the crime requires appellants to be "unmarried" and the indictment so charged.

The question is whether a state can forbid parties by statute from contracting a lawful marriage within the state because of their race, and then convict the same parties for entering into "unlawful" cohabitation?

This Court has not determined the validity of a miscegenation law. *Pace v. Alabama*, *supra*, did not involve a marriage; although the statute in *Pace* forbids intermarriage as well as adultery and fornication, no charge of intermarriage was made. No decision on the merits of this issue was reached by this Court in either *Naim v. Naim*, 350 U. S. 891 (1955), app. dismissed 350 U. S. 985, or *Jackson v. Alabama*, 348 U. S. 888, a denial of certiorari. Miscegenation laws have been recently on the books in over 20 states and many others have been repealed, some in recent years.⁶ These laws have been upheld by at least twelve states' highest courts.⁷ But the California Supreme Court has held its law unconstitutional under the Fourteenth Amendment in *Perez v. Lippold*, 32 Cal. 2d 711, 198 P. 2d 17 (1948).

It seems quite clear in view of subsequent decisions that *Perez v. Lippold* reached the proper result under the Fourteenth Amendment. This Court's many decisions holding racial segregation laws invalid, from *Buchanan v. Warley*, in 1917, to date, destroy any possible argument in favor of the validity of §741.11. The racists' "pure races" theory and other similar notions offered in attempted justification for such a law have all been rejected in connection with other segregation laws. (See generally Weinberger, *op. cit.*)

6 Lists of the laws appear in Weinberger, *A Reappraisal of the Constitutionality of Miscegenation Statutes*, 42 Cornell L. Q. 208 (1957), and Greenberg, *Race Relations and American Law*, Appendix A. 28, pp. 397-398 (1959).

7 Weinberger, *op. cit.* 209.

The states have traditionally exercised control over the marital institution. *Maynard v. Hill*, 125 U. S. 190; *Reynolds v. United States*, 98 U. S. 145. But the liberty protected by the due process clause "is not confined to mere freedom from bodily restraint"; rather, it "extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." *Bolling v. Sharpe*, 347 U. S. 497, 499. The right to marry is a protected liberty under the Fourteenth Amendment. In *Meyer v. Nebraska*, 262 U. S. 390, 399, the Court said:

While this Court has not attempted to define with exactness the liberty thus guaranteed (by the Fourteenth Amendment), the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to . . . marry, establish a home and bring up children. . . .

The essence of the right to marry is a freedom to join in marriage with the person of one's own choice.

Another incident of the right to marry is the right of privacy. Under the circumstances of these convictions, not only may a private relationship be subjected to criminal prohibition but a private place—the home—is unjustifiably subjected to governmental regulation, and the types of invasion of privacy attendant upon investigation of crime, e.g., surveillance, searches, etc. The due process clause of the Fourteenth Amendment protects the right of privacy (*Mapp v. Ohio*, 367 U. S. 643; see also *Poe v. Ullman*, 367 U. S. 497, 517-522 (dissenting opinion); cf. *Public Utilities Commission v. Pollak*, 343 U. S. 451, 467, 469 (dissenting opinion)), and privacy of association

(*NAACP v. Alabama*, 357 U. S. 449) from unwarranted state interference. The state cannot show that any valid governmental purpose is furthered by the deprivation of liberty occasioned by the miscegenation law.

III

Appellants Were Denied Due Process of Law Under the Fourteenth Amendment Because the Statute Under Which They Were Convicted Was Vague and Indefinite.

In order to convict under §798.05 the state must prove that one party is a "Negro." The purported definition of "Negro" occurs in §1.01 of the Florida statutes, which holds any person with "one eighth or more of African or Negro blood" to be a "Negro." Section 1.01, on its face, and as applied at the trial, is so ambiguous and susceptible of such diversified interpretation that the standard of clarity required by the due process clause of the Fourteenth Amendment is lacking.

No reasonably unvarying definition can be given to the terms "African or Negro blood." First, one deficiency of the definition is readily apparent, i.e., that "Negro" is defined by using the word sought to be defined—in the phrase "Negro blood." This is no help at all. "African" might seem at first to be a finite concept. But does Florida really mean to refer to all citizens of African countries—to the citizens of North Africa and the Afrikaners of South Africa for example? When it is considered that the population of the vast African continent is diverse and constantly changing, the definition is exposed as meaningless. But of course there is a great deal more. There is no such thing as African or Negro "blood" in any genetic or biological sense, and there is no known method by which

proportions of such "blood" (such as 1/8th) can be determined. One scholar remarked:

Laws prohibiting marriage between "whites and persons having one-eighth or more of Negro blood" are compounded of legal fiction and genetic nonsense. Hager, "Some Observations on the Relationship Between Genetics and Social Science," 13 *Psychiatry* 371, 375 (1950).⁸

Florida's definition, employing fractions of blood, rests on the assumption that somewhere it is possible to find, and to ascertain that one has found, a racially pure person—e.g., a man with 100% Negro "blood." But neither the statute nor science tells us how this fine calculation and determination possibly can be made. Unless one can locate such purity somewhere the whole system of fractions breaks down and becomes unserviceable. It is, of course, even more remarkable to make a man legally bound to know and act on the basis of the racial "blood" of his great-grandparents or even more remote ancestors. This is comparable to the Louisiana statute invalidated by this Court which required "the impossible;" namely, that one give an affidavit that none of the officers in his organization were Communists or subversives. *Louisiana v. NAACP*, 366 U. S. 293.

In this case the trial court sought to avoid all these problems by ignoring the statutory framework (the 1/8th rule) and simply allowing a jury to determine race on a policeman's testimony as to appellants' appearance (R. 100-101, 103). When this standard is made an "appearance" standard—the average man's or indeed juror's

⁸ And see generally the authorities collected in Weinberger, *op. cit.* 217-221.

opinion as to what race appearance indicates—then the last pretense of statutory clarity is gone. The appearance standard is obviously a varying and easily shifting method in which a man's race is not an objective thing at all, but rather springs from the mind and eye of each beholder. That such a standard should not be used in sending people to jail is so obvious that it need not be labored. Differences of opinion, perception, etc., as to race based on appearance are a commonplace of life. To make a man conduct his affairs on the basis of a preliminary guess as to what his race will be in the opinion of some future unknown witnesses and jurors using an appearance rule places liberty on a slippery surface unworthy of the criminal law of a civilized society. It is easily as vague as the term "gangster" in the New Jersey law invalidated in *Lunzetta v. New Jersey*; 306 U. S. 451. The vice is compounded by the fact that §1.01(6) never gave a hint that some rough rule of thumb was involved; on its face it pretends mathematical precision.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the questions presented are substantial and the Court should herein determine this appeal, and upon consideration thereof reverse the judgments below.

Respectfully submitted,

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APPENDIX

Opinion Below

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION
AND, IF FILED, DETERMINED

IN THE
SUPREME COURT OF FLORIDA

January Term, A.D. 1963

Case No. 31,906

DEWEY McLAUGHLIN and
CONNIE HOFFMAN also
known as CONNIE GONZALEZ,

Appellants.

—v.—

STATE OF FLORIDA,

Appellees.

Opinion filed May 1, 1963

An Appeal from the Criminal Court of Record for Dade
County, GENE WILLIAMS, Judge

ROBERT RAMER, H. L. BRAYNON and G. E. GRAVES, for
Appellants

RICHARD W. ERVIN, Attorney General, and JAMES G.
MAHORNER, Assistant Attorney General, for Appellees

CALDWELL, J.

This cause is here on appeal from the Criminal Court of
Record of Dade County. The trial court directly passed

upon the validity of a State statute and we, therefore, have jurisdiction.

Defendants are charged with having violated Fla. Stat. §798.05¹ in that "the said Dewey McLaughlin, being a negro man, and the said Connie Hoffman, being a white woman, who were not married to each other did habitually live in and occupy in the nighttime the same room." The defendants moved to quash the information on the ground that the aforesaid statute was in violation of the Federal and State Constitutions. The motions were denied. Defendants were then arraigned and entered pleas of not guilty. The jury trial terminated in a verdict of guilty, a sentence of thirty days in the county jail and a fine of \$150 for each defendant.

The defendants contend they were denied equal protection of the laws because "Firstly, the law provides a special criminal prohibition on cohabitation solely for persons who are of different races; or, secondly, if this special statute is equated with the general fornication statute, the higher penalties are imposed on the person whose races differ than would be applicable to persons of the same race who commit the same acts."

In *Pace vs. Alabama*,² the Supreme Court of the United States upheld an Alabama Statute³ prohibiting interracial marriage, adultery or fornication, against the contention

1 Fla. Stat. §798.05

"Any negro man and white woman, or any white man and negro woman, who are not married to each other, who shall habitually live in and occupy in the nighttime the same room shall be punished by imprisonment not exceeding twelve months, or by fine not exceeding five hundred dollars."

2 106 U. S. 207 (1883).

3 Ala. Code of 1876, §4189 (now Ala. Code, Title 14, §360 [1958]).

that it denied equal protection of the law. Another Alabama Statute⁴ prohibited adultery or fornication between members of the same race but provided a less severe maximum penalty. The Supreme Court speaking through Mr. Justice Field held:

"Equality of protection under the laws implies not only accessibility by each one, whatever his race, on the same terms with others, to the courts of the country for the security of his person and property, but that in the administration of criminal justice he shall not be subjected, for the same offense, to any greater or different punishment . . .

"The defect in the argument of counsel, consists in his assumption that any discrimination is made by the laws of Alabama in the punishment (sic) provided for the offense for which the plaintiff in error was indicted, when committed by a person of the African race and when committed by a white person. The two sections of the Code cited are entirely consistent. The one prescribes, generally, a punishment for an offense committed between persons of different sexes; the other prescribes punishment for an offense which can only be committed where the two sexes are of different races. There is in neither section any discrimination against either race. Section 4184 equally includes the offense when the persons of the two sexes are both white and when they are both black. Section 4189 applies the same punishment to both offenders, the white and the black. Indeed, the offense against which this latter section is aimed cannot be committed without involving the persons of both races in the same punishment.

⁴ Ala. Code of 1876, §4184 (now Ala. Code, Title 14, §16 [1958]).

Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same."

The appellants seek adjudication of their right to engage in integrated illicit cohabitation upon the same terms as are imposed upon the segregated lapse. But, as was admitted by counsel in argument, this appeal is a mere way station on the route to the United States Supreme Court where defendants hope that, in the light of supposed social and political advances, they may find legal endorsement of their ambitions.

This Court is obligated by the sound rule of stare decisis and the precedent of the well written decision in *Pace*, supra. The Federal Constitution, as it was when construed by the United States Supreme Court in that case, is quite adequate but if the new-found concept of "social justice" has out-dated "the law of the land" as therein announced and, by way of consequence, some new law is necessary, it must be enacted by legislative process or some other court must write it.

Affirmed.

ROBERTS, C.J., TERRELL, THOMAS, THORNAL and O'CONNELL, JJ., concurring. DREW, J., agrees to judgment.

Final Judgment Denying Rehearing

IN THE
SUPREME COURT OF FLORIDA

January Term, A.D. 1963

Thursday, May 30, A.D. 1963

Case No. 31,906

DEWEY McLAUGHLIN and
CONNIE HOFFMAN also
known as CONNIE GONZALEZ,

Appellants,

—v.—

STATE OF FLORIDA,

Appellee.

On consideration of the Petition for Rehearing filed by
Attorneys for Appellants,

IT IS ORDERED by the Court that the said petition be, and
the same is hereby, denied.

A True Copy,

Test:

GUYT E. P. McCORD
Clerk Supreme Court

(The Mandate From This Court Has Today Been Issued and
Mailed to the Clerk of the Criminal Court of Record for
Dade County)

Office Supreme Court, U.S.

FILED

MAR 21 1964

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IN THE

**Supreme Court of
The United States**

October Term, 1962

No. **11**

**DEWEY McLAUGHLIN and CONNIE HOFFMAN,
also known as CONNIE GONZALEZ,**

Appellants,

—vs—

THE STATE OF FLORIDA,

Appellee

**RESPONSE OF APPELLEE
TO
JURISDICTIONAL STATEMENT**

**JAMES W. KYNES
Attorney General
State of Florida**

**JAMES G. MAHORNER
Assistant Attorney General
State of Florida**

Counsel for Appellee

TABLE OF CONTENTS

OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	8-18
QUESTION I	6
QUESTION II	8
QUESTION III	14
QUESTION IV	16
CONCLUSION	18
PROOF OF SERVICE	19

TABLE OF CITATIONS

CASE:	PAGE:
McLaughlin vs. State, 153 So. 2d 1	1
Naim vs. Naim, 350 U.S. 985, 100 I.Ed. 852	4, 12, 13
Pace vs. Alabama, 106 U.S. 583	10
People vs. Colton, 2 Utah 457	10
State vs. McDuffie, 107 N.C. 885, 12 S.E. 83	10
State vs. Naylor, 68 Okla. 139, 136 P. 889	10

TEXTS AND OTHER AUTHORITIES

Section 1.01, Florida Statutes	5, 14, 15
Section 798.02, Florida Statutes	2, 3, 6, 7
Section 798.03, Florida Statutes	3
Section 798.05, Florida Statutes	2, 3, 4, 6, 7, 10, 14, 15, 16
Section 918.10, Florida Statutes	4, 11
Section 924.33, Florida Statutes	11
Rule 3.7i, Florida Appellate Rules	14
28 U.S.C., 1257	1
Fourteenth Amendment, United States Constitution	17
Article I, Section 3, United States Constitution	17
Article V, United States Constitution	5, 16
Congressional Globe, 39th Congress, First Session, 4032	17

IN THE
**Supreme Court of
The United States**

October Term, 1963

No. 585

**DEWEY McLAUGHLIN and CONNIE HOFFMAN,
also known as CONNIE GONZALEZ,**

Appellants,

—vs—

THE STATE OF FLORIDA,

Appellee.

**RESPONSE OF APPELLEE
TO
JURISDICTIONAL STATEMENT**

OPINION BELOW

Appellee concedes that the pertinent opinion herein sought to be reviewed is that found in 153 So. 2d 1, 1963, and that such opinion is accurately duplicated in the appendix of appellants' jurisdictional statement.

JURISDICTION

Appellee concedes that appropriate jurisdiction to entertain this proceeding is vested in this court pursuant to 28 U.S.C., 1257.

QUESTIONS PRESENTED

Appellee will follow the questions presented on page four of the appellants' jurisdictional statement, but will add to such the question of the validity of the Fourteenth Amendment of the federal constitution, which amendment is the sole basis for each and every attack made by the appellants upon their convictions.

STATEMENT OF THE CASE

Appellee accepts appellants' statement of the case as the same appears in their brief at pages 4, 5, and 6 thereof only insofar as it reflects a true and correct resume of what the record below would, without conflict, reveal.

SUMMARY OF ARGUMENT

The act prohibited by Section 798.05, Florida Statutes (interracial cohabitation), is the same act which is prohibited to members of the same race by Section 798.02, Florida Statutes.

The provisions of Section 798.02, *supra*, provide a maximum punishment of two years of confinement while the provisions of 798.05, *supra*, (under which the appellants were prosecuted) provide a maximum punishment of one year confinement. Appellants are obviously in the favored class—if there be any—and are therefore not in a position to complain.

Appellants further are not in a position to complain because, as a matter of fact, and as conceded by appellants' brief on page 6, appellants received a sentence of thirty days and a fine of \$150.00, or in default of such payment, an additional thirty-day term. Such sentence in effect is equivalent to a sentence of two months in the county jail. Appellants thus received a sentence of a term less than that authorized by Section 798.03, Florida Statutes, for offenses involving mere casual acts of fornication, as distinguished from the provisions of Section 798.02 and Section 798.05, Florida Statutes, which prohibit the greater indecency of general public cohabitation.

The question of interracial marriage is not involved in the instant case, as the defense of marriage was not available to the appellants, because there was not adequate evidence to give rise to such defense. The state is not called upon to negate the existence of the exception of marriage provided by the terms of Section 798.05, *supra*, nor is the state required to prove the negative, i.e., to prove that the defendants were not married. Marriage constitutes an affirmative defense which the defendants must prove.

There is much evidence which indicates that the defendants were not married to each other; however, the state acknowledges that such evidence is not pertinent to the question of whether the instructions of the trial judge (telling the jury that a common law marriage in this state between the defendants would not be valid) deprived the defendants of a defense of mar-

riage to which they would have otherwise have been entitled. The fact which is pertinent, however, is that the sole evidence which could possibly be utilized to support a defense of marriage is a statement given by a prosecuting witness that one of the defendants had related to such witness that such defendant was living in a common law marriage with the co-defendant. Such statement was clearly hearsay for the purpose of establishing a valid marriage. It is likewise clear that the statement itself is insufficient to establish a common law marriage insomuch as a representation from both defendants would have been necessary in order to establish such marriage. There was, therefore, insufficient evidence of a marriage between the defendants, and such defendants were thus not entitled to have such defense considered.

It is further urged that defendants did not object to the giving of the instruction regarding miscegenation, as is required by Section 918.10, Florida Statutes, and therefore the correctness of such instruction was never presented to the trial court, thus providing adequate state grounds for the appellate court's refusal to reverse the conviction on such basis.

The case of *Naim vs. Naim*, 350 U.S. 985, 100 L.Ed. 852, has previously established as precedent that a prohibition against interracial marriage does not give rise to a federal question.

Section 798.05, Florida Statutes, is not subject to a constitutional attack on the basis of ambiguity. The

court can take judicial knowledge of the fact that there exists a race known as the Negro race. The statute, when considered along with Section 1.01, Florida Statutes, defines a Negro as one who is at least a $12\frac{1}{2}\%$ ($\frac{1}{8}$) full-blooded descendant of the Negro race. Since appellants have failed to arrange to present all of that evidence to this court which was before the jury, to wit: the presence of the defendants themselves—this court must presume that the Negro defendant has the racial characteristics of a 100% Negro and that the white defendant has the racial characteristics of a 100% Caucasian. Such evidence would certainly be sufficient to place the jury in a position to convict the appellants, after favoring them with every reasonable doubt on the issue of race.

It is further urged that since Article V of the federal constitution prohibits depriving the states of representation in the United States Senate, the court must accept as a *de jure* fact that the United States Senate at the time the Fourteenth Amendment was proposed, consisted of 72 members, two for each of the 36 then existing states. Article V of the federal constitution requires that a constitutional amendment be approved by $\frac{2}{3}$ of the Senate; an affirmative proposal by the resulting $\frac{2}{3}$ figure of 48 was not obtained. It therefore follows that the Fourteenth Amendment was not, as a matter of law, ever been constitutionally proposed. Such amendment being invalid, an essential base for each of the positions taken by the appellants is removed.

ARGUMENT

QUESTION I

WHETHER THE DEFENDANTS, BY BEING PROSECUTED UNDER A STATUTE WHICH PROHIBITS INTERRACIAL COHABITATION, WERE DENIED EQUAL PROTECTION AND DUE PROCESS OF LAW, AS SUCH TERMS ARE ENCOMPASSED BY THE PROVISIONS OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

That act prohibited by Section 798.05, Florida Statutes, is the same act which is prohibited to members of the same race by Section 798.02, Florida Statutes. Such sections read as follows:

Section 798.02, Florida Statutes:

"Lewd and lascivious behavior.—If any man and woman, not being married to each other, lewdly and lasciviously associate and cohabit together, or if any man or woman, married or unmarried, is guilty of open and gross lewdness and lascivious behavior, they shall be punished by imprisonment in the state prison not exceeding two years, or in the county jail not exceeding one year, or by fine not exceeding three hundred dollars."

Section 798.05, Florida Statutes:

"Negro man and white woman or white man and Negro woman occupying same room.—Any negro man and white woman, or any white man and negro

woman, who are not married to each other, who shall habitually live in and occupy in the nighttime the same room shall each be punished by imprisonment not exceeding twelve months, or by fine not exceeding five hundred dollars."

It is clear that the terms of Section 798.02, supra, prohibit **intragracially** the same act as is prohibited **interracially** by the terms of Section 798.05, supra.

As can further be seen by reference to the above quoted sections, the maximum punishment provided in Section 798.05, supra, is less than the maximum punishment provided for violations of Section 798.02, supra. Thus, if there is a class distinction made by the two statutes, the present defendants are clearly in the favored class and have no standing on which to urge a constitutional deficiency.

Going outside the statutes and into the facts of the case, we find still further evidence that the appellants herein are not in an unfavored position. Such appellants were convicted in an area the citizens of which are metropolitan, sophisticated, and possessed of a diversified cultural background. The characteristics of such area are generally conducive to racial tolerance, and the sentence of the appellants reflects such fact, such sentence being a nominal thirty-day jail term and a fine of \$150.00. The sentence is one which resulted because of a violation of basic concepts of sexual decency and not because of any heated, passionate reaction based on racial intolerance.

QUESTION II

WHETHER THE INSTANT CASE FORMS A PROPER BASIS FOR PRESENTING FOR JUDICIAL REVIEW THE VALIDITY OF THE MISCEGENATION PROVISIONS OF THE FLORIDA STATUTES AND FLORIDA CONSTITUTION.

It should first be said that there is ample evidence to demonstrate that defendants are not married to each other. The defendant, Connie Hoffman, at the time of entering into the lease for the apartment where the offense here in question was committed represented that a man other than the defendant McLaughlin was her husband (TR 29). Connie Hoffman identified herself by signature as having a last name other than that of the defendant McLaughlin's (TR 38). Approximately one year before the offense was committed, the defendant McLaughlin had, when applying for employment registration, stated that he had a wife named Willie McLaughlin (Tr 119, 132). There was testimony that Connie Hoffman had acknowledged having had a former marriage to one other than McLaughlin. Connie Hoffman, at a date after the offense herein in question was committed, acknowledged that the defendant McLaughlin was not her husband and that she had a husband other than the defendant McLaughlin (TR 135).

The state recognizes that the issue is not whether there was adequate evidence to show that the defend-

ants were **not** married, but whether there was **inadequate evidence** to demonstrate that the defendants were married, even if all the evidence favoring the existence of a marriage between the defendants was taken to be true. The sole evidence of a marriage between the defendants is furnished by a statement that Connie Hoffman had represented to the owner of the premises whereon she was residing that Dewey McLaughlin was her husband. Such representation was only placed before the jury by the testimony of the landlady, the owner of said premises; it was not given to the jury by testimony of Connie Hoffman. Such statement was hearsay and incompetent for the purpose of proving a valid existing marriage. The statement was admissible for the purpose of establishing a common law marriage; however, representation by one party is not sufficient to establish a common law marriage and since the record is void of any representation made by the defendant McLaughlin that he was married to Connie Hoffman, it is patent that the evidence is insufficient to establish the defense of marriage.

For the purpose of re-emphasis, even if all of the evidence favoring the existence of a valid marriage between the defendants was believed, there would be still insufficient evidence to establish the existence of such marriage.

The state is not required to prove that the defendants were **not** married. This proposition is supported

by several well known principles of law. The state is not called upon to negate the existence of the exception found in the terms of Section 798.05, Florida Statutes, to wit: marriage. The state is not required to prove the negative, i.e., that the defendants were not married. Marriage constitutes an affirmative defense to be proven by the defendants.

It is clear that if the prosecution was required to prove that defendants who engaged in sexual offenses were not married, successful prosecution for such sexual violations would be impossible. An example of the difficulties which would arise may be furnished by considering the possibilities under the well-known Mann Act. A defendant who took a woman across a state line, for a purpose which would not be immoral if such woman and such defendant were married, could always successfully avoid punishment if the prosecution had to show that the defendant and the woman had never been married anywhere in the world. The difficulties which would arise if the rule were different well justify the rule that the existence of marriage must be demonstrated by those who have the peculiar knowledge of such fact, to wit: the defendants themselves. *State vs. McDuffie*, 107 N.C. 885, 12 S.E. 83; *State vs. Naylor*, 68 Okla. 139, P. 889; *People vs. Colton*, 2 Utah 457.

The defendants herein did not demonstrate the existence of marriage; the jury was therefore correctly instructed that the defense of marriage was not avail-

able to the defendants. Thus it is of no consequence that such defense was removed from the consideration of the jury by an instruction to such jury that the defendants could not formalize a common law marriage in the prosecuting state.

There exists under the circumstances in which the instruction was given two adequate state grounds for the upholding of the conviction on appeal in spite of the rendering of the instruction on the invalidity of interracial marriage formalized in the state of Florida:

(1) Section 924.33, Florida Statutes, directs the appellate courts of this state not to reverse unless errors committed by a trial court are of a harmful nature. The error which had the result of denying the defendants the defense of marriage (to which they were not entitled regardless of such error) can not be of a harmful nature.

(2) The second ground is furnished by the failure of the defendants to make any objection to the instruction in question, as is required by Section 918.10, Florida Statutes. Because of such failure the issue involving the correctness of the instruction was never presented to the trial court, and therefore the appellate court was not provided with grounds for reversal, even if the instruction was incorrect, because the trial court could not err on issues not presented or considered.

Even if it were assumed arguendo that the question of the validity of the miscegenation provisions of Florida law were properly presented by the instant case, such question has previously been determined by this court to be of a non-federal nature. In the case of *Naim vs. Naim*, 87 S.E. 2d 749, 197 Va. 80, the Supreme Court of Virginia ruled that a state statute which prohibited interracial marriage did not violate either the federal or state constitution. The United States Supreme Court remanded the case to the state court so that such state court would indicate the true relationship of the parties involved in the case to the State of Virginia (350 U.S. 891, 100 L.Ed. 784). The Virginia court then set out in detail that the parties were so related to the State of Virginia at the time of formulating the marriage as to give the Virginia court jurisdiction to question the validity of such marriage under Virginia law. 197 Va. 734, 90 S.E.2d 849. The Supreme Court of the United States then held, following the determination made by the Virginia Court, that no federal question was involved in the case. 350 U.S. 985, 100 L.Ed. 852. Thus the Supreme Court of the United States held that no federal question was involved in the state statute which prohibited interracial marriage. An analysis of the case reveals that the Supreme Court held that the only constitutional question involved was the question of whether the Virginia law was applicable to the formation of the marriage. It is probable that the United States Supreme Court determined that the relationship of marriage is one which is provided for by the state, and

that such relationship is not secured by any constitutional guarantees of the federal constitution. It may well be that there is nothing in the federal constitution which would prevent the people of the state of Florida from enacting through their Legislature a statute which prohibited all marriage and sexual relations.

Even if the holding of the Naim decision, *supra*, is incorrect, this court should not be led by opposing argument into ruling on a constitutional question of such import as miscegenation in a case the style of which records for eternal history the fact that the parties were not married.

QUESTION III**THE TERMS OF THE STATUTE ARE NOT
AMBIGUOUS.**

This court does not have before it all of the evidence that the defendant Hoffman is Caucasian and the defendant McLaughlin is Negro. Evidence which is not present here, but which was present during the trial is: the defendants themselves. Since the appellants have not arranged to present such evidence, correct appellate procedure requires that all factual issues to which such evidence is related must be resolved against the appellants. Thus it may be assumed that in fact Dewey McLaughlin has the external physical characteristics of a 100% full-blooded member of the Negro race, and that Connie Hoffman has such characteristics of the Caucasian race as would establish her to be 100% Caucasian.

The gist of the appellants' complaints seems to be that Section 798.05, Florida Statutes, when read with Section 1.01, Florida Statutes, is too exact when using an exact percentage definition of Negro. The mathematical exactness negates the existence of ambiguity; it does not establish it.

It is further significant that the defendants never argued the issue of ambiguity to the Florida Supreme Court. Under Florida law, assignments of error which are not argued are considered abandoned. (See Rule 3.7i, Florida Appellate Rules.) The state would not

wish to urge a technical position in order to avoid an argument which otherwise had merit; however, it is clear that if the other issues-argued by the appellants are invalid, their conviction should not be overthrown simply on the basis that Section 798.05, Florida Statutes, when read in conjunction with Section 1.01, Florida Statutes, provides an ambiguous definition of what constitutes a Negro. The sin of such sections, if anything, is over-exactness; it is not ambiguity. It is further clear that even if the sections could be considered ambiguous to some, it is not established that either of the appellants herein were in a position of close proximity to the racial line drawn by Sections 798.05 and 1.01, Florida Statutes. In fact, the contrary must be presumed. Thus the statutes are not ambiguous as to the circumstances of the defendants. The controlling question is whether the defendants were perhaps led into believing that their act was not prohibited. Such was not the case.

QUESTION IV

WHETHER THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION IS OF SUCH VALIDITY AS TO ENABLE THE APPELLANTS TO UTILIZE THE PROVISIONS OF SUCH AMENDMENT IN THEIR ATTACK AGAINST THEIR CONVICTIONS.

Appellants' basis of attack against miscegenation and the alleged discriminatory characteristics of Section 798.05, Florida Statutes, must be supported by the provisions of the Fourteenth Amendment if such attack is to be successful. Article V of the federal constitution provides:

"The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which in either case, shall be valid to all intents and purposes; as part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by convention in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth

section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

It is therefore clear that the Senate, as a matter of law, consisted of seventy-two members when the Fourteenth Amendment was proposed on June 8, 1866, (well after the civil war). Article I, Section 3 provided that each state be entitled to two senators. It is therefore clear that as a matter of law, the Senate at the time the Fourteenth Amendment was proposed consisted of 72 seats. The Fourteenth Amendment, as is recorded by Congressional Globe, 39th Congress, First Session 4032, was proposed by only thirty-three members of the Senate. Article V requires that $\frac{2}{3}$ of both houses must propose amendments. It is clear that the proposal was made by a number less than the 48 which would have been required if the $\frac{2}{3}$ provisions of Article V were honored. The amendment, having been unconstitutionally proposed, can not be constitutionally adopted.

CONCLUSION

WHEREFORE, because of the foregoing reasons, it is respectfully urged that the facts peculiar to the instant case do not support the substantial federal questions which are urged by the appellants. This court is respectfully requested not to render a discriminatory decision on the adequate questions presented.

Respectfully submitted,

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CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing Response to Jurisdictional Statement has been furnished by mail this _____ day of March, 1964, to the following as members of counsel for Appellants:

Honorable Jack Greenberg; Honorable James M. Nabrit, III; Honorable Leroy D. Clark; Honorable Robert Ramer; Honorable H. L. Braynon; Honorable G. E. Graves, Jr.; Honorable Louis H. Pollak, and Honorable William T. Coleman, Jr.

Of Counsel for Appellee.

Office-Supreme Court, U.S.
FILED

AUG 25 1964

JOHN F. DAVIS, CLERK

U. S.

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Appellants,

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR APPELLANTS

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INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Questions Presented	4
Statement	4
Summary of Argument	7

ARGUMENT:

- I. Appellants Were Convicted Under a Law Which Makes Race an Element of the Crime, Punishing a Negro and a White Person for Acts Not Prohibited When Done by Persons of the Same Race, and Thus Violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment 9
- II. Appellants Were Denied Rights Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment by Florida's Miscegenation Laws Which Had the Effect of Requiring the Jury to Disregard Evidence of a Common Law Marriage If It Decided That One Appellant Was White and That the Other Was Negro 15
- III. Appellants Were Denied Due Process Because Either There Was No Proof of Their Race or Florida's Racial Definition Is Vague 27

CONCLUSION	31
------------------	----

APPENDIX:

States Repealing Miscegenation Laws in Recent Years	1a
States Repealing Miscegenation Laws in Last Century	2a
States Never Enacting Statutes Which Prohibit Interracial Marriage	2a
States at Present Prohibiting Interracial Marriages	3a

TABLE OF CASES

Abington School District v. Schempp, 374 U. S. 203	13
Anderson v. Martin, 379 U. S. 399	12, 26
Bell v. Maryland, — U. S. —, 12 L. ed. 2d 822	25
Bolling v. Sharpe, 347 U. S. 497	12
Brown v. Board of Education, 347 U. S. 483	12, 13, 14, 25
Buchanan v. Warley, 245 U. S. 60	8, 12, 13, 14, 26
Burns v. State, 48 Ala. 195 (1872)	24, 26
Callen v. Florida, 94 So. 2d 603 (Fla. 1957)	11
Campbell v. State, 92 Fla. 775, 109 So. 809 (1926)	18
Chaaachou v. Chaaachou, 73 So. 2d 830 (Fla. 1954)	16
Cloud v. State, 64 Fla. 237, 60 So. 180 (1912)	11
Connally v. General Construction Co., 269 U. S. 385	30
Cooper v. Aaron, 358 U. S. 1	25
Dorsey v. State Athletic Commission, 168 F. Supp. 149 (E. D. La. 1958), aff'd 359 U. S. 533	13
Edwards v. California, 314 U. S. 160	13

Gayle v. Browder, 352 U. S. 903, affirming, 142 F. Supp. 707 (M. D. Ala. 1956)	13, 14, 26
Gibson v. Mississippi, 162 U. S. 565	13
Goss v. Board of Education, 373 U. S. 683	13, 14, 25, 26
Green v. State, 58 Ala. 190 (1877)	24
Grice v. State, 76 Fla. 751, 78 So. 984 (1914)	12
Hamilton v. Alabama, 376 U. S. 650	12
Hill v. United States ex rel. Weiner, 300 F. S. 105	14
Hirabayashi v. United States, 320 U. S. 81	12
Holmes v. Atlanta, 350 U. S. 879, reversing 223 F. 2d 93 (5th Cir. 1955)	13
Jackson v. Alabama, 348 U. S. 888	18
Johnson v. Virginia, 373 U. S. 61	13, 26
Korematsu v. United States, 323 U. S. 214	12, 20
Langford v. State, 124 Fla. 428, 168 So. 528 (1936)	11
Lanzetta v. New Jersey, 306 U. S. 451	30
LeBlanc v. Yawn, 99 Fla. 467, 126 So. 789 (1930)	17
Lewis v. State, 53 So. 2d 707 (Fla. 1951)	18
Lombard v. Louisiana, 373 U. S. 267	13, 26
Lonas v. State, 50 Tenn. 287 (1871)	20
Luster v. State, 23 Fla. 339, 2 So. 690 (1887)	11
Malloy v. Hogan, — U. S. —, 12 L. ed. 2d 653	18
Meyer v. Nebraska, 262 U. S. 390	19
Missouri Pacific Railway Co. v. Kansas, 248 U. S. 276	25
Moore v. Missouri, 159 U. S. 673	14
Naim v. Naim, 350 U. S. 891, app. dismissed 350 U. S. 985	18
National Prohibition Cases, 253 U. S. 350	25
Navarro, Inc. v. Baker, 54 So. 2d 59 (Fla. 1951)	16
Orr v. State, 129 Fla. 398, 176 So. 510 (1937)	18

	PAGE
Pace v. Alabama, 106 U. S. 583	7, 8, 13, 14, 18
Parramore v. State, 81 Fla. 621, 88 So. 472 (1921)	10
Penton v. State, 42 Fla. 560, 28 So. 774 (1900)	11
Perez v. Lippold, 32 Cal. 2d 711, 198 P. 2d 17 (1948)	19, 21; 26
Peterson v. Greenville, 373 U. S. 244	8, 13, 14, 26
Pinson v. State, 28 Fla. 735, 9 So. 706 (1891)	11
Plessy v. Ferguson, 163 U. S. 537	13, 20
Scott v. Georgia, 39 Ga. 321 (1869)	21
Scott v. Sanford, 19 How. 393	24
Shelley v. Kraemer, 334 U. S. 1	14, 26
Skinner v. Oklahoma, 316 U. S. 535	19
State v. Jackson, 80 Mo. 175 (1883)	21
State v. Pass, 59 Ariz. 16, 121 F. 2d 882 (1942)	20
Steele v. Louisville & N. R. Co., 323 U. S. 192	13
Thomas v. State, 39 Fla. 437, 22 So. 725 (1897)	11
Thompson v. Louisville, 362 U. S. 199	28
Thompson's Estate, In re, 145 Fla. 42, 199 So. 352 (1940)	17
Wall v. Altbello, 49 So. 2d 532 (Fla. 1950)	25
Watson v. Memphis, 373 U. S. 526	26
Whitehead v. State, 48 Fla. 64, 37 So. 302 (1904)	11
Wildman v. State, 157 Fla. 334, 25 So. 2d 808 (1946)	10, 11
Williams v. Bruffy, 96 U. S. 176	2
Wright v. Georgia, 373 U. S. 284	13, 26

STATUTES

Ala. Code, 1940, §301(31c)	14
Fla. Act. Jan. 23, 1832, §§1, 2	25
F. S. A. Constitution; Declaration of Rights, §12	18
F. S. A. Constitution, Art. 16, §24	2, 8, 15
F. S. A. §731.29	25
F. S. A. §741.11	3, 8, 15, 25

F. S. A. §741.12	3, 8, 15
Fla. Stat. Anno., §741.13	16
Fla. Stat. Anno., §741.14	16
Fla. Stat. Anno., §741.15	16
Fla. Stat. Anno., §741.16	16
F. S. A. §1.01(6)	3, 8, 27, 28, 29
F. S. A. §798.01	12
F. S. A. §798.02	11, 12
F. S. A. §798.03	11, 13
F. S. A. §798.04	11
F. S. A. §798.05	1, 2, 4, 6, 7, 8, 9, 10, 11, 12, 13, 15, 27
S. C. Code, 1952, §5377	14
28 U. S. C. §1257(2)	2
42 U. S. C. §1981	26

OTHER AUTHORITIES

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Dobzhansky, "The Race Concept in Biology," <i>The Sci- entific Monthly</i> , LII (Feb. 1941)	21
Hankins, <i>The Racial Basis of Civilization</i> (1926)	23
Kroeber, <i>Anthropology</i> (1948)	23
Montague, <i>An Introduction to Physical Anthropology</i> (1951)	23
Montague, <i>Man's Most Dangerous Myth: The Fallacy of Race</i> (4th ed. 1964)	21, 22, 23, 29
Note, 58 Yale L. J. 472 (1949)	22
Note, "Rights of Illegitimates Under Federal Stat- utes," 76 Harv. L. Rev. 337 (1962)	25

	PAGE
Rand-McNally, <i>Cosmopolitan World Atlas</i>	29
UNESCO, "Statement on the Nature of Race and Race Differences—by Physical Anthropologists and Genet- icists, September 1952"	22
Weinburger, "A Reappraisal of the Constitutionality of Miscegenation Statutes," 42 <i>Cornell L. Q.</i> 208 (1957) ..	22
Yerkes, "Psychological Examining in the U. S. Army", 15 <i>Mem. Nat. Acad. Sci.</i> 705 (1921)	23

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR APPELLANTS

Opinion Below

The Criminal Court of Record In and For Dade County, Florida did not render an opinion. The opinion of the Supreme Court of Florida is reported in 153 So. 2d 1 (1963) (R. 99).

Jurisdiction

Appellants were convicted in the Criminal Court of Record In and For Dade County, Florida, on June 24, 1962 of violating Florida Statutes Annotated §798.05. They appealed to the Supreme Court of Florida, contending that the convictions and the Florida laws involved violated the equal protection and due process clauses of the Fourteenth Amendment. On May 1, 1963, the Supreme Court of Florida affirmed the convictions and decided in favor of the validity of F. S. A. §798.05 under the Constitution of the United

States (R. 99). Petition for rehearing in the Supreme Court of Florida was denied May 30, 1963 (R. 105).

Appellants filed Notice of Appeal in the Supreme Court of Florida on August 29, 1963 (R. 106), and a Jurisdictional Statement in this Court, October 28, 1963. Probable jurisdiction was noted April 27, 1964 (377 U. S. 974). Jurisdiction of this Court on appeal rests on 28 U. S. C. §1257(2). *Williams v. Bruffy*, 96 U. S. 176, 182-184. Appellants, moreover raised substantial questions as to the constitutionality of their convictions under the Fourteenth Amendment.

Constitutional and Statutory Provisions Involved

1. Petitioners were convicted of violating F. S. A. §798.05 (Vol. 22, Title 44, p. 277) which provides:

§798.05—*Negro man and white woman or white man and negro woman occupying same room.*

Any negro man and white woman, or any white man and negro woman, who are not married to each other, who shall habitually live in and occupy in the nighttime the same room shall each be punished by imprisonment not exceeding twelve months, or by fine not exceeding five hundred dollars.

2. This case also involves Fla. Const., Art. 16, §24 (Volume 26A, p. 450):

§24—*Intermarriage of white persons and negroes prohibited.*

All marriages between a white person and a negro, or between a white person and a person of negro descent to the fourth generation, inclusive, are hereby forever prohibited.

3. F. S. A. §741.11 (Vol. 21A, Title 42, p. 58):

§741.11—Marriages between white and negro persons prohibited.

It is unlawful for any white male person residing or being in this state to intermarry with any negro female person; and it is in like manner unlawful for any white female person residing or being in this state to intermarry with any negro male person; and every marriage formed or solemnized in contravention of the provisions of this section shall be utterly null and void, and the issue, if any, of such surreptitious marriage shall be regarded as bastard and incapable of having or receiving any estate, real, personal or mixed, by inheritance.

4. F. S. A. §741.12 (Vol. 21A, Title 42, p. 59):

§741.12—Penalty for intermarriage of white and negro persons.

If any white man shall intermarry with a negro, or if any white woman shall intermarry with a negro, either or both parties to such marriage shall be punished by imprisonment in the state prison not exceeding ten years, or by fine not exceeding one thousand dollars.

5. F. S. A. §1.01 (Vol. 1, Title 1, p. 124):

§1.01—Definitions.

(6) The words "negro", "colored", "colored persons", "mulatto" or "persons of color", when applied to persons, include every person having one-eighth or more of African or negro blood.

6. This case also involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Questions Presented

Whether the conviction of appellants violates the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution, where:

(1) The State has created an offense, F. S. A. §798.05, expressly defined in terms of race which punishes interracial couples for engaging in certain conduct while not punishing such conduct by two persons of the same race?

(2) Appellants were denied a full jury consideration of an ingredient of the crime, i.e. the absence of a common law marriage, by jury instructions based on Florida's laws prohibiting Negroes and whites from marrying?

(3) There was either no evidence to satisfy Florida's racial definition in F. S. A. §1.01(6)—an essential part of the crime created by F. S. A. §798.05—or the definition is so vague and indefinite as to establish no standard of criminality?

Statement

Appellants were arrested February 28, 1962 and charged with having violated F. S. A. §798.05 in that "the said Dewey McLaughlin, being a Negro man, and the said Connie Hoffman, also known as Connie Gonzalez, being a white woman, who were not married to each other, did habitually live in and occupy in the nighttime the same room" (R. 3). Appellants were convicted by a jury and each was sentenced to thirty days in the County Jail at hard labor and fined \$150.00, plus costs, and in default of such payment to an additional 30 day term (R. 7-9).

In April 1961, appellant Connie Hoffman began residing in an "efficiency" apartment at 732 Second Street, Miami Beach, Florida (R. 22). The landlady testified that she

first saw appellant Dewey McLaughlin in either December, 1961 or February, 1962 (R. 23, 25). She questioned Connie Hoffman about the identity of Mr. McLaughlin and was told he was her husband (R. 3). Appellant Hoffman then "signed in" Mr. McLaughlin as her husband (R. 23). Mr. McLaughlin, born in Honduras, but apparently an American citizen, was then employed by a Miami Beach hotel (R. 82).

The landlady claimed that appellants thereupon began living together for a period of ten or twelve days (R. 24, 26). She stated that she observed McLaughlin showering in the bathroom one evening, heard him talking to appellant Hoffman at 10:00 at night, and noticed his clothing hanging in the apartment (R. 29, 30, 26). Moreover, she saw him going in and out of the apartment during this period (R. 29). Although she claimed to see McLaughlin enter the apartment every evening, she was not certain that he in fact remained there through the night (R. 26, 29, 30). Although she saw McLaughlin leave appellant Hoffman's apartment at least twice early in the morning, she asserted that she did not know if he lived there every day during this period (R. 26, 29, 30). Disturbed by the presence of a colored man in her apartments, she reported the situation to the police (R. 23).

Detectives Stanley Marcus and Nicolas Valeriana of the Miami Beach Police Department went to Hoffman's apartment at 7:15 p.m., February 23, 1962, to investigate a charge of neglect of her minor son (R. 35, 44). They knocked at the door and a man's voice answered, "Connie, come in," but the door was not opened (R. 51). Valeriana went to the back of the apartment and found McLaughlin leaving through the rear door (R. 70). In the questioning which followed, McLaughlin admitted that he had been living there with Hoffman (R. 46) and that on one occasion he had had sexual relations with her (R. 47). The detec-

tives also observed a few pieces of McLaughlin's wearing apparel in the room (R. 45). Appellant Hoffman came to the police station where McLaughlin was being held and while there stated that she was living with him but thought that this was not unlawful (R. 48). At trial Detective Valeriana identified her as a white woman, using his "many personal observations and experiences" as a standard (R. 59). On the basis of his "factual contacts, experiences and observations," he characterized Dewey McLaughlin as a Negro (R. 58, 65).

Joseph DeCesare, a secretary in the City Manager's Office, testified that while securing a civilian registration card, McLaughlin stated in January 1961 that he "was separated and that his wife's name was Willie McLaughlin" (R. 74, 75). Dorothy Kaabe, a child welfare worker in the Florida State Department of Public Welfare, testified that in an interview on March 5, 1962, appellant Hoffman stated that she began living with McLaughlin as her common law husband in September or October 1961 (R. 83, 84).

March 1, 1963, an information was filed against appellants charging them with violating F. S. A. §798.05 (R. 3). Motion to quash the information on grounds that it was vague and deprived them of due process and equal protection of the laws was denied (R. 5, 6). Motions for a directed verdict arguing that F. S. A. §1.01(6) (defining the term "Negro" as used in F. S. A. §798.05) was vague (R. 61) and that race remained unproven were made and denied (R. 88-89).

The trial judge instructed the jury that in Florida a Negro and a white person could not have been lawfully married, either by common law or formal ceremony (R. 94).

Appellants were convicted by a jury and sentenced to 30 day jail terms and fines of \$150 (R. 7-9).

7

A motion for new trial was filed alleging error in the court's failure to quash the information as a violation of Fourteenth Amendment rights (R. 10, 11) and was denied (R. 11).

On appeal to the Supreme Court of Florida appellants assigned errors relying on the due process and equal protection clauses of the Fourteenth Amendment (R. 12).

The Court, in affirming the conviction, discussed only F. S. A. §798.05 which it found constitutional in light of *Pace v. Alabama*, 106 U. S. 583 (R. 99-102). Its jurisdiction derived from the trial court's passing on the validity of a state statute (R. 99):

In the Florida Supreme Court, appellant's brief also argued that the instruction to the jury on Florida's miscegenation law contravened the Fourteenth Amendment (Tr. of Record (on file in this Court) 180-183). The State urged that miscegenation laws were constitutional and that the instruction could only be harmless error (Tr. of Record 195-199). Appellants sought rehearing, attempting to secure the Florida Supreme Court's discussion of this issue (R. 102-103), but rehearing was denied without opinion (R. 105).

Summary of Argument

I.

Appellants were convicted of a crime under an explicitly racial Florida law, which punishes an interracial couple for acts which are not prohibited if committed by persons of the same race. No other Florida statute, including the lewdness law (F. S. A. §798.02), contains the identical elements of the crime defined in F. S. A. §798.05 used to convict petitioners. Florida has advanced no justification for the racial distinctions made by this law. The racial clas-

sification is unreasonable, and this Court should strike it down as it has every other segregation law from *Buchanan v. Warley*, 245 U. S. 60 to *Peterson v. Greenville*, 373 U. S. 244. This case is different from *Pace v. Alabama*, 106 U. S. 583, but if the reasoning of *Pace* extends to cover this case, *Pace* should be overruled as inconsistent with many subsequent decisions in this Court.

II.

The trial court's jury instructions based on Florida's laws prohibiting interracial marriages (F. S. A. Const., Art. 16 §24; F. S. A. §§741.11, 741.12) prevented the jury from considering appellants' possible common law marriage. The jury instruction was not harmless since Florida recognizes common law marriage, there was sufficient evidence to go to the jury on the question, and the state had the burden of proving that appellants were not married to each other.

The states have power to control many aspects of marriage, but no power to prohibit marriage on the basis of irrational discriminations. Florida has advanced no reason to support this racial distinction. Arguments advanced by other states fly in the face of all scientific knowledge which rejects the theories of "pure races," and Negro inferiority. The miscegenation laws are relics of slavery based on race prejudice. State enforcement of these laws violates the Fourteenth Amendment for the same reasons that all segregation laws have been invalidated.

III.

To convict under F. S. A. §798.05 Florida had to prove that McLaughlin was a "Negro" (as defined in F. S. A. §1.01(6)), and that Hoffman was "white" (nowhere defined in Florida law). The state made no effort to prove race by reference to the Florida statutory definition (decreeing

that a Negro is a person with "one-eighth or more of African or Negro blood"). The definition is meaninglessly circular and based on assumptions contrary to scientific fact. If the definition is taken literally the conviction violates due process, being based on no evidence of an element of the offense. But Florida relied on an "appearance" test, sanctioned by the trial judge, using opinion testimony by a policeman to prove race. The appearance test removes any pretense of statutory clarity and depends entirely on varying individual perceptions. This standard is far too vague to support criminal convictions. The vagueness of legal definitions of race vitiates crimes depending upon a person's race.

ARGUMENT

I.

Appellants Were Convicted Under a Law Which Makes Race an Element of the Crime, Punishing a Negro and a White Person for Acts Not Prohibited When Done by Persons of the Same Race, and Thus Violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The statute under which the appellants were prosecuted and convicted, F. S. A. §798.05, proscribes the habitual occupancy of a room by an interracial couple.¹ As an ostensible effort to restrain illicit sexual relations, the statute might seem to fall within the state's traditional power to

¹ "798.05 *Negro man and white woman or white man and Negro woman occupying same room.*

Any negro man and white woman, or any white man and negro woman, who are not married to each other, who shall habitually live in and occupy in the nighttime the same room shall each be punished by imprisonment not exceeding twelve months, or by fine not exceeding five hundred dollars."

punish acts which affront public morality. Yet, the means by which Florida purports to serve this goal violate the Fourteenth Amendment by introducing a racial distinction into the State's criminal laws, by a statute in which sexual relations are not even an element of the crime.

Section 798.05 defines a crime that can be committed only by two persons of opposite sex, when one is Negro and the other is white. Appellants submit that no Florida statute punishes similar conduct by persons of the same race. But Florida has argued that F. S. A. §798.05 covers the same act which is punished irrespective of race by F. S. A. §798.02 which prohibits (and provides a greater penalty for) lewd and lascivious association and cohabitation.² The relevant Florida decisions, though, leave little room for such an interpretation.

There are three elements of the offense created by §798.05: 1) there must be a habitual occupancy of and living in a room in the nighttime, 2) the offenders must be a Negro man and white woman or white man and Negro woman, and 3) they must be persons who are not married to each other. *Parramore v. State*, 81 Fla. 621, 88 So. 472 (1921); *Wildman v. State*, 157 Fla. 334, 25 So. 2d 808 (1946); and see charge to jury at R. 93. Sexual relations between the parties are not a necessary element of the crime created by §798.05. *Parramore v. State*, *supra*.

On the other hand, it is well established that to convict for lewd and lascivious association and cohabitation

² "F.S.A. §798.02. *Lewd and lascivious behavior*.

If any man and woman, not being married to each other, lewdly and lasciviously associate and cohabit together, or if any man or woman, married or unmarried, is guilty of open and gross lewdness and lascivious behavior, they shall be punished by imprisonment in the state prison not exceeding two years, or in the county jail not exceeding one year, or by fine not exceeding three hundred dollars."

(§798.02), the state must prove "both a lewd and lascivious intercourse and a living together as in the conjugal relation between husband and wife." *Wildman v. State, supra*, 25 So. 2d at 808; *Pinson v. State*, 28 Fla. 735, 9 So. 706 (1891); *Whitehead v. State*, 48 Fla. 64, 37 So. 302 (1904); *Luster v. State*, 23 Fla. 339, 2 So. 690 (1887); *Cloud v. State*, 64 Fla. 237, 60 So. 180 (1912); *Langford v. State*, 124 Fla. 428, 168 So. 528 (1936). Sexual intercourse is very definitely an element of this crime, and single or occasional acts of incontinence will not sustain a conviction under §798.02. *Wildman v. State, supra*; *Penton v. State*, 42 Fla. 560, 28 So. 774 (1900); *Thomas v. State*, 39 Fla. 437, 22 So. 725 (1897).

Clearly, §798.05 (living in the same room) and §798.02 (lewdness) are distinct both on their face and as interpreted. Florida, in fact, has simultaneously prosecuted persons under both statutes, and in reversing both convictions the Florida Supreme Court gave no indication that it regarded the laws as identical.³ *Wildman v. State*, 157 Fla. 334, 25 So. 2d 808 (1946). It is notable that in reversing the convictions under both statutes in *Wildman, supra*, the case was remanded for new trial without the slightest intimation that the state could not again proceed on both charges. *Wildman* is apparently still good law; it was followed in *Callen v. Florida*, 94 So. 2d 603 (1957).

Florida, thus, has created a specific crime, relating exclusively to interracial couples. Mere proof that an unmarried man and woman of the same race habitually occu-

³ It would have been unusual for the Florida Supreme Court, unless clearly compelled, to attribute to its legislature the meaningless gesture of duplication. It has not done so. Surely the legislature had some difference in mind when it set different punishments in §798.02, and §798.05. Compare §798.03 (fornication generally: 3 months imprisonment and \$30 fine) with §798.04 (white person and Negro living "in adultery or fornication": 12 months imprisonment and \$1,000 fine).

pied a room in the nighttime would not establish a crime under Florida law.*

By labeling "criminal" conduct that might be otherwise innocent, merely because the parties are of different races, Florida has violated its duty to afford to all persons the equal protection of the laws. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U. S. 81, 100. And see, *Korematsu v. United States*, 323 U. S. 214, 216; *Brown v. Board of Education*, 347 U. S. 483; *Hamilton v. Alabama*, 376 U. S. 650; *Anderson v. Martin*, 379 U. S. 399.

Florida, however, has not advanced (and cannot advance) any constitutionally acceptable basis for making the conduct described by §798.05 a crime only when persons of different races are involved. Surely, there is no justification for eliminating solely on a racial basis the requirements of proof that the state must meet in other crimes against public morality. The racial classification is unreasonable, is not clearly related to any legitimate governmental objective, and violates the due process and equal protection clauses of the Fourteenth Amendment. Cf. *Buchanan v. Warley*, 245 U. S. 60; *Bolling v. Sharpe*, 347 U. S. 497.

* Cf. *Grice v. State*, 76 Fla. 751, 78 So. 984 (1914), where defendants were acquitted of adultery (F. S. A. §798.02) since there was no showing of sexual relations though there was evidence they frequently slept in the same room along with others. Such conduct would seem covered by a charge under F. S. A. §798.05 if persons of different races engaged in it. The Court said that the "mere living together of two persons of opposite sexes, either of whom is married to a third person, does not constitute the offense of living in an open state of adultery, but there must be acts of sexual intercourse between them to constitute adultery. . . ." The adultery law (§798.01) is the analogue of the lewdness law (§798.02) for persons married to others.

As early as 1896, this Court said that criminal justice must be administered "without reference to consideration based on race," *Gibson v. Mississippi*, 162 U. S. 565, 591. From *Buchanan v. Warley*, 245 U. S. 60, to *Peterson v. Greenville*, 373 U. S. 244, the Court has repeatedly struck down laws attempting to require separation of the races by imposing criminal penalties. See e.g. *Dorsey v. State Athletic Commission*, 359 U. S. 533, affirming 168 F. Supp. 149 (E. D. La. 1958) (interracial boxing a crime; held, unconstitutional); *Holmes v. Atlanta*, 350 U. S. 879, reversing 223 F. 2d 93 (5th Cir. 1955) (desegregated golf matches criminal; held unconstitutional); *Brown v. Board of Education*, 347 U. S. 483; *Gayle v. Browder*, 352 U. S. 903, affirming 142 F. Supp. 707 (M. D. Ala. 1956); *Johnson v. Virginia*, 373 U. S. 61; *Lombard v. Louisiana*, 373 U. S. 267; *Wright v. Georgia*, 373 U. S. 284.

In short, "race is constitutionally an irrelevance" (*Edwards v. California*, 314 U. S. 160, 185), and "... discriminations based on race alone are obviously irrelevant and invidious." *Steele v. Louisville & N. R. Co.*, 323 U. S. 192, 203; cf. *Abington School District v. Schempp*, 374 U. S. 203 (Justice Stewart dissenting); *Goss v. Board of Education*, 373 U. S. 683, 687-688. In the words of the first Justice Harlan, the Constitution is "color blind," *Plessy v. Ferguson*, 163 U. S. 537, 558 (dissenting opinion). The decision below is in the teeth of this Court's repeated holdings that racial segregation laws are invalid.

This case is somewhat different from *Pace v. Alabama*, 106 U. S. 583, where the conduct alleged was criminal irrespective of the race of the parties, although greater penalties were proscribed when the offenders were not of the same race. Here no penalties are provided for men and women of the same race who commit the acts mentioned in F. S. A. §798.05. (Substantially lower penalties are inflicted under the fornication law—F. S. A. §798.03.) But appel-

lants have no hesitancy in urging that *Pace* should be overruled if its reasoning is thought to extend to this case, and to support the distinction made here. The *Pace* decision rested on the notion that the state can treat an act differently when committed by persons of different races, and punish it as a "different" crime. The silent premise is that the states can segregate the races. *Pace* stands as an isolated vestige of the "separate but equal" era inconsistent with the entire development of the law of equal protection since *Brown v. Board of Education*, 347 U. S. 483, or perhaps even since *Buchanan v. Warley*, 245 U. S. 60. This Court has cited *Pace* only two times in the eighty-two years since it was decided and race discrimination was not an issue in either of those cases.⁵ It ought to be overruled. Probably no segregation law would ever have been invalidated if this Court followed the reasoning of *Pace* that equality is assured merely because Negro and white co-defendants are liable to the same punishment. Indeed, most segregation laws struck down in recent years have been indiscriminately applicable to both Negro and white violators of the segregation commands,⁶ but have nevertheless been invalidated on the ground that states serve no legitimate governmental functions by segregating the races. Cf. *Peterson v. Greenville*, 373 U. S. 244; and see *Goss v. Board of Education*, 373 U. S. 683, 687-688; *Shelley v. Kraemer*, 334 U. S. 1, 22.

⁵ See, e.g., *Moore v. Missouri*, 159 U. S. 673, 678 (1895); *Hill v. United States ex rel. Weiner*, 300 U. S. 105, 109 (1937).

⁶ See, for example, the segregation laws invalidated in *Brown v. Board of Education* (*Briggs v. Elliott*), 347 U. S. 483 (S. C. Code 1952, §5377), and *Gayle v. Browder*, 352 U. S. 903, affirming 142 F. Supp. 707, 710 (M. D. Ala. 1956) (Ala. Code 1940, §301 (3)c)).

II.

Appellants Were Denied Rights Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment by Florida's Miscegenation Laws Which Had the Effect of Requiring the Jury to Disregard Evidence of a Common Law Marriage If It Decided That One Appellant Was White and That the Other Was Negro.

The trial court's instructions to the jury based on Florida's miscegenation laws deprived appellants of the possibility of acquittal on the ground of common law marriage because of race. As the language of the statute makes clear, marriage of the parties absolutely vitiates any prosecution based upon F. S. A. §798.05. The trial court, however, instructed the jury so as to effectively prohibit it from finding that appellants were married if it found that one was white and the other was Negro.⁷ This instruction was required by Florida Constitution, Art. 16, §24,⁸ and by F. S. A. §§741.11⁹ and 741.12,¹⁰ which prohibit and penalize marriages between white and Negro persons.¹¹

⁷ In charging the jury the judge said (R. 94):

"I further instruct you that in the State of Florida it is unlawful for any white female person residing or being in this state to intermarry with any Negro male person and every marriage performed or solemnized in contravention of the above provision shall be utterly null and void."

⁸ "24. *Intermarriage of white persons and negroes prohibited*

Sec. 24. All marriages between a white person and a negro, or between a white person and a person of negro descent to the fourth generation, inclusive, are hereby forever prohibited."

⁹ "741.11 *Marriages between white and negro persons prohibited*

It is unlawful for any white male person residing or being in this state to intermarry with any negro female person; and it is in like manner unlawful for any white female person residing or being in this state to intermarry with any negro male person; and every marriage formed or solemnized in

Before dealing with the constitutionality of the miscegenation laws, we shall treat the state's argument that the jury instruction was harmless even if erroneous and that the validity of the miscegenation laws may not be decided in this case. The error *was* harmful, and several factors lead to the conclusion that the binding jury instruction may have deprived appellants of an opportunity for acquittal.

First, Florida gives full recognition to common law marriage and accords it the same legal incidents as a formal marriage. *Chaachou v. Chaachou*, 73 So. 2d 830 (Fla. 1954); *Navarro Inc. v. Baker*, 54 So. 2d 59 (Fla. 1951). Indeed, in this case the trial judge instructed the jury as to Florida law on common law marriage (R. 94). This implies that he deemed the marriage issue sufficiently involved to require the jury to decide it, if it found that appellants were of the same race.

Secondly, the evidence taken in its most favorable light tends to establish that appellants had contracted a common

contravention of the provisions of this section shall be utterly null and void, and the issue, if any, of such surreptitious marriage shall be regarded as bastard and incapable of having or receiving any estate, real, personal or mixed, by inheritance."

¹⁰ "741.12. *Penalty for intermarriage of white and negro persons*

If any white man shall intermarry with a negro, or if any white woman shall intermarry with a negro, either or both parties to such marriage shall be punished by imprisonment in the state prison not exceeding ten years, or by fine not exceeding one thousand dollars."

¹¹ In addition, Florida prohibits county judges from issuing marriage licenses to Negro and white couples (F. S. A. §741.13), and ministers and other persons from performing a ceremony of marriage for an interracial couple (F. S. A. §741.15). The penalties for violations are respectively 2 years imprisonment and \$1,000 fine (F. S. A. §741.14) and one year and \$1,000 (F. S. A. §741.16).

law marriage. There was enough evidence elicited from the State's witnesses to create an inference of common-law marriage so as to constitute a jury question.

Although there was testimony that McLaughlin had in January 1961 made a statement that he was "separated" from Willie May McLaughlin (whose last address he did not know) (R. 74), there was no explanatory or corroborating evidence before the jury indicating a prior legal marriage, or that a prior wife was still alive, or that there had been no divorce during the intervening year before this charge was brought. Appellant Hoffman held herself out in conversations with her landlady and in "signing in" at the apartment as being married to McLaughlin (R. 23). She did the same thing in conversation with a welfare worker who testified that appellant said that "she began living with Mr. McLaughlin as her common-law husband" (R. 84). Whatever the effect of the other statements mentioned by the welfare worker—who seemingly did not distinguish between a "ceremonial" marriage and a "legal" one—any conflicts or inconsistencies should have been resolved by the jury. All of these matters might have been weighed by the jury in appraising the evidence if the instruction had been different.

Statements by the parties to each other of present and binding intention to be married effect a common law marriage in Florida. *LeBlanc v. Yawn*, 99 Fla. 467, 126 So. 789 (1930); *In re Thompson's Estate*, 145 Fla. 42, 199 So. 352 (Fla. 1940). The testimony of the parties that they uttered to each other words of present intention provides the best evidence of common law marriage. But, where the best evidence cannot be obtained, reputation and cohabitation will raise and support a presumption of common law marriage, *LeBlanc v. Yawn, supra*. Appellants did not testify and could not be required to, as they enjoyed constitutional privileges against self incrimination in this criminal

proceeding. F. S. A. Const., Declaration of Rights, §12; see also *Malloy v. Hogan*, — U. S. —, 12 L. ed. 2d 653. Since their own testimony—the best evidence—was therefore not available, testimony as to reputation and cohabitation could have sufficed to satisfy a jury.

Thirdly, the burden was on the State to demonstrate beyond a reasonable doubt that appellants were not married. Although the attorney general has argued that Florida cannot be forced to prove a negative and that marriage constitutes an affirmative defense to be proved by the defendants, Florida law seems to be otherwise. In his charge the trial judge listed non-marriage as one of the elements to be proved (R. 93). In *Orr v. State*, 129 Fla. 398, 176 So. 510, 511 (1937), where defendants were prosecuted under a law punishing "[w]hoever, not standing in the relation of husband or wife . . . maintains or assists the principal or accessory before the fact or gives the offender any other aid, knowing that he has committed a felony . . .", the court held that the burden of proving the non-existence of common law marriage rested upon the state. Well-settled rules of Florida practice, moreover, require the state to prove each and every element of the offense and the allegations in the information. See, *Campbell v. State*, 92 Fla. 775, 109 So. 809 (Fla. 1926); *Lewis v. State*, 53 So. 2d 707 (Fla. 1951). The information filed against appellants charged them with "not being married" (R. 3).

Thus the constitutionality of the miscegenation law is involved. This Court has never ruled on the issue. *Pace v. Alabama*, *supra*, did not involve a marriage. Although the statute in *Pace* forbade intermarriage (as well as adultery and fornication) no charge of intermarriage was made. No decision on the merits of this issue was rendered in either *Naim v. Naim*, 350 U. S. 891, app. dismissed 350 U. S. 985, or *Jackson v. Alabama*, 348 U. S. 888 (denial of certiorari).

The states have traditionally exercised a great degree of control over the institution and incidents of marriage. Yet, in this matter, as in others, the state's power is not untrammelled, but must yield to the constitutional strictures of due process and equal protection. Cf. *Meyer v. Nebraska*, 262 U. S. 390. The right to marry is a protected liberty under the Fourteenth Amendment; it is one of the "basic civil rights of man." *Skinner v. Oklahoma*, 316 U. S. 535, 541. In *Meyer v. Nebraska*, *supra*, the Court declared (262 U. S. 390, 399):

While this Court has not attempted to define with exactness the liberty thus guaranteed [by the Fourteenth Amendment], the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to . . . marry, establish a home and bring up children. . . .

The right to choose one's own husband or wife is clearly a right going to the very heart of personal liberty and freedom. A government that interferes with personal choice in marriage is regulating one of the most vital areas of its citizens' lives. The due process and equal protection clauses surely prevent the states from engaging in irrational discriminations in this vital area of personal liberty.¹²

Therefore, it is not enough for Florida to insist that it can, without limit, abridge the liberty of persons to marry under the guise of the police power. Who would doubt, for

¹² Cf. *Perez v. Lippold*, 32 Cal. 2d 711, 198 P. 2d 17, 19 (1948):

"Marriage is thus something more than a civil contract subject to regulation by the state; it is a fundamental right of free men. There can be no prohibition of marriage except for an important social objective and by reasonable means."

example, that Florida could not validly ban marriages between Republicans and Democrats, or between redheads and brunettes. The states cannot prohibit marriage on any irrational basis they choose. In prohibiting marriage on a racial basis, Florida has advanced no rational justification for the discrimination effected.

But while it has advanced no reasons, those which it might be expected to bring forth in an effort to validate its miscegenation laws are plainly suspect. On their face, these racial laws run counter to the "color-blindness" of the Constitution. *Plessy v. Ferguson*, 163 U. S. 537, 558 (dissenting opinion); cf. *Korematsu v. United States*, 323 U. S. 214.

Some courts have upheld miscegenation statutes, predicated on their reasonableness on beliefs in the value of "racial purity." It has been said that a purpose is preventing the mixing of "bloods." *State v. Pass*, 59 Ariz. 16, 121 P. 2d 882 (1942). In *Lonas v. State*, 50 Tenn. 310, 311 (1871), the Court stated:

The laws of civilization demand that the races be kept apart in this country. The progress of either does not depend on an admixture of blood.

• • •

[Intermarriage would be] a calamity full of the saddest and gloomiest portent

A Georgia court announced that:

Such [moral and social] equality does not exist and never can. The God of nature made it otherwise, and no human law can produce it and no human tribunal can enforce it. . . . From the tallest archangel in Heaven, down to the meanest reptile on earth, moral and social inequalities exist and must continue to exist

through all eternity. (*Scott v. Georgia*, 39 Ga. 321, 326, (1869).)

Some courts have found a justification for these laws in the state's power to preserve and ensure the health of their citizens, as Missouri's court did in 1883¹³ and as a Georgia court did in 1869.¹⁴

Clearly all of these grounds for miscegenation¹⁵ laws rest on theories long deemed nonsensical throughout the world's community of natural scientists. The idea of "pure races" has long been abandoned by science. The distinguished American geneticist Theodosius Dobzhansky has said:

The idea of a pure race is not even a legitimate abstraction; it is a subterfuge used to cloak one's ignorance of the phenomenon of racial variation. (Dobzhansky, "The Race Concept in Biology," *The Scientific Monthly*, LII (Feb. 1941), pp. 161-165.)

¹³ "It is stated as a well authenticated fact that if the issue of a black man and a white woman and a white man and a black woman intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites. . . ." *State v. Jackson*, 80 Mo. 175, 179 (1883).

¹⁴ "The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observations show us, that the offspring of these unnatural connections are generally sick and effeminate, and that they are inferior in physical development and strength to the full-blood of either race. . . . Such connections never elevate the inferior race to the position of superior, but they bring down the superior to that of the inferior. They are productive of evil, and evil only, without any corresponding good." (Emphasis added.) *Scott v. Georgia*, 39 Ga. 321, 323 (1869).

¹⁵ Even the word "miscegenation," to refer to intermarriage, was reportedly invented as a hoax in an 1864 political pamphlet connected with a presidential campaign. See discussion in Montague, *Man's Most Dangerous Myth: The Fallacy of Race*, 400 (4th ed. 1964).

And see the many scientific authorities rejecting the "pure race" idea collected in Weinberger, "A Reappraisal of the Constitutionality of Miscegenation Statutes," 42 Cornell L.Q. 208, 217, n. 68.¹⁶

The 1952 UNESCO Statement On The Nature of Race,¹⁷ prepared by distinguished natural scientists from around the world, concludes:

There is no evidence for the existence of so-called "pure" races. Skeletal remains provide the basis of our limited knowledge about earlier races. In regard to race mixture, the evidence points to the fact that human hybridization has been going on for an indefinite but considerable time. Indeed, one of the processes of race formation and race extinction or absorption is by means of hybridization between races. As there is no reliable evidence that disadvantageous effects are produced thereby, no biological justification exists for prohibiting intermarriage between persons of different races.

Similarly, other pseudoscientific props for racism, including the notions of biological disadvantages of race mixture; and the assumption that cultural levels depend on racial factors, are completely undermined by modern scientific knowledge.¹⁸ For example, the 1952 UNESCO Statement, *supra*, concludes by saying:

¹⁶ See also Note, 58 Yale L. J. 472 (1949).

¹⁷ The full title is "Statement on the Nature of Race and Race Differences—by Physical Anthropologists and Geneticists, September 1952," published by UNESCO. The statement, published in numerous publications by UNESCO (as well as a similar 1950 UNESCO statement of social scientists) is conveniently available in Appendix A of Montague, *op. cit.*, 361 et seq.

¹⁸ The importance of environmental factors in determining cultural levels was noted by the court in *Perez v. Lippold*, 32 Cal. 2d 711, 198 P. 2d 17, 24-25 (1948). Major contemporary research

9. We have thought it worth while to set out in a formal manner what is at present scientifically established concerning individual and group differences.

(1) In matters of race, the only characteristics which anthropologists have so far been able to use effectively as a basis for classification are physical (anatomical and physiological).

(2) Available scientific knowledge provides no basis for believing that the groups of mankind differ in their innate capacity for intellectual and emotional development.

(3) Some biological differences between human beings within a single race may be as great or greater than the same biological differences between races.

(4) Vast social changes have occurred that have not been connected in any way with changes in racial type. Historical and sociological studies thus support the view that genetic differences are of little significance in determining the social and cultural differences between different groups of men.

(5) There is no evidence that race mixture produces disadvantageous results from a biological point of view. The social results of race mixture whether for good or ill, can generally be traced to social factors.

And see, generally, Montague, *Man's Most Dangerous Myth: The Fallacy of Race* (4th ed. 1964), for a noted anthropologist's full discussion of the most recent scientific evidence and research on race.

demonstrating the absence of any relation between race and cultural achievement is found in Beals and Hoijer, *An Introduction to Anthropology* 195-198 (1953); Hankins, *The Racial Basis of Civilization* 367-371 (1926); Kroeber, *Anthropology* 190-192 (1948); Ashley Montague, *An Introduction to Physical Anthropology* 352-381 (1951); Yerkes, "Psychological Examining in the U. S. Army," 15 Mem. Nat. Acad. Sci. 705-742 (1921).

Actually, the miscegenation laws never really rested on any firm scientific foundation nor were they intended to serve a scientific purpose. Miscegenation laws grew out of the system of slavery and were based on race prejudices and notions of Negro inferiority used to justify slavery, and later segregation.

(Chief Justice Taney said in *Scott v. Sanford*, 19 How. 393, 409 (1857):

[The miscegenation laws] show that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the persons who joined them in marriage. . . . *This stigma, of the deepest degradation, was fixed upon the whole race.* (emphasis added).

As an earlier Alabama court, which found a miscegenation statute unconstitutional, announced in *Burns v. State*, 48 Ala. 195, 197 (1872):¹⁹

It cannot be supposed that this discrimination was otherwise than against the negro, on account of his servile condition, because no state would be so unwise as to impose disabilities in so important a matter as marriage on its most favored citizens, without consideration of their advantage.

The fact that the miscegenation doctrine relates to the caste system, rather than to any design to protect race

¹⁹ *Burns* was overruled in *Green v. State*, 58 Ala. 190 (1877).

"purity", is confirmed by the harsh treatment of the children of such marriages.²⁰

These are laws with a "purely racial character and-purpose," like the regulations in *Goss v. Board of Education*, 373 U. S. 683, 688. Miscegenation laws are "relics of slavery"²¹ and their enforcement by the states violates the Fourteenth Amendment.²² This Court has struck down numerous segregation laws rejecting all manner of state claims of Negro inferiority, and claims of the legitimacy of governmentally required and encouraged racism. *Brown v. Board of Education*, 347 U. S. 483; *Cooper v. Aaron*, 358

²⁰ For example, F. S. A. §741.11 declares that the issue of interracial marriages "shall be regarded as bastards." It, in addition, renders them "incapable of having or receiving any estate, real, personal or mixed by inheritance." Florida, where the parents are of one race, has modified the rigors of the common law dealing with bastardy. F. S. A. §731.29. This latter class of illegitimate children can inherit property from the mother. Through acknowledgment by the father they are enabled to inherit through him. *Wall v. Altbello*, 49 So. 2d 532 (1950). Yet, issue of interracial marriages cannot be legitimized and can never inherit property. Children can ordinarily be legitimized by the subsequent marriage of the parents. Where, however, the parents are of different races, F. S. A. §741.11 prevents them from legitimizing their children in this manner. See also, Note, "Rights of Illegitimates Under Federal Statutes," 76 Harv. L. Rev. 337 (1962), for the possible impact of Florida miscegenation laws on federally created rights.

²¹ Cf. *Bell v. Maryland*, — U. S. —, 12 L. ed. 2d 822, 871, 877 (separate opinion of Justice Douglas). F. S. A. §741.11 is derived from Fla. Act. Jan. 23, 1832, §§1, 2. Miscegenation laws now remain in effect in only nineteen states; see appendix, *infra*.

²² Florida's belated argument that the Fourteenth Amendment is not binding on it because improperly proposed in the Senate is frivolous. But responsive to Florida's argument concerning the vote needed to propose a constitutional amendment, see *National Prohibition Cases*, 253 U. S. 350, 386 (two-thirds of those present); cf. *Missouri Pacific Railway Co. v. Kansas*, 248 U. S. 276. On June 8, 1866, the Senate had a quorum; 44 members were present; 33 of those present (far more than two-thirds) voted in favor of the proposed amendment. 46th Cong. Globe, part 4, p. 3042 (39th Cong., 1st Sess.).

U. S. 1; *Goss v. Board of Education*, 373 U. S. 683; *Johnson v. Virginia*, 373 U. S. 61; *Peterson v. Greenville*, 373 U. S. 244; *Lombard v. Louisiana*, 373 U. S. 267; *Wright v. Georgia*, 373 U. S. 284; *Watson v. Memphis*, 373 U. S. 526; *Anderson v. Martin*, 379 U. S. 399; *Shelley v. Kraemer*, 339 U. S. 1; *Buchanan v. Warley*, 245 U. S. 60; *Gayle v. Browder*, 352 U. S. 903.²³ The logic of those cases compels the same result here.

The issue is whether under our Constitution Negroes will have the same personal liberties and the same status as citizens given to white Americans. There can be but one answer if the purposes of the Fourteenth Amendment are to be realized in our law.

²³ Cf. *Perez v. Lippold*, 32 Cal. 2d 711, 198 P. 2d 17 (1948) (invalidating California's miscegenation law; and see *Burns v. State*, 48 Ala. 195 (1872), holding an Alabama miscegenation law violative of the Fourteenth Amendment and a federal statute (now 42 U. S. C. §1981) as well. (As noted above *Burns* was overruled by a later Alabama Court.)

III.

Appellants Were Denied Due Process Because Either There Was No Proof of Their Race or Florida's Racial Definition Is Vague.

In order to convict under F. S. A. §798.05, Florida was required to prove beyond a reasonable doubt that appellant McLaughlin was a Negro and that appellant Hoffman was white. Florida law has attempted to define "Negro," but there is no attempt at all to define a white person. The definition of "Negro" in F.S.A. §1.01(6) is:

... (6) The words "negro," "colored," "colored persons," "mulatto" or "persons of color," when applied to persons, include every person having one-eighth or more of African or negro blood.

At the trial in this case the prosecution made no pretense of proving race (an element of the crime) by reference to the statutory rule—"one-eighth or more of African or negro blood." Instead, the prosecutor relied on a policeman's opinion as to the race of both appellants (R. 65), and his opinion was admittedly based merely upon observation of them.

The State surely failed to satisfy the literal requirements of F. S. A. §1.01(6) as to either appellant. This is quite evident from a colloquy between the Court and counsel. Defense counsel objected to opinion evidence on appellants' race saying that the State was bound by the statutory definition which mentioned "blood"; that there was no such thing as "Negro blood"; and that the statute was thus vague (R. 61). The trial judge, after expressing doubt as to his power to declare a state law unconstitutionally vague, said that this one had to be given a "common sense" construction and that it must refer to "anyone whose blood

is 1/8th from a Negro ancestor" (R. 62). When counsel pointed out that there was no proof concerning appellant's ancestors, the Court said, "Then we come back to the appearance again" (R. 63), and ruled that "anybody who had considerable experience in dealing and associating with Negro people and white people will be able to testify to some extent at least as to the race of particular persons" (*Id.*), and that any doubts were going to be "up to the jury" (*Id.*). The policeman was then allowed to express his opinion that McLaughlin was a Negro and Hoffman was white.

It may be noted that the instruction to the jury consisted of a reading of F. S. A. §1.01(6) and a statement that an element of the crime was:

... That one defendant in this case has at least one-eighth Negro blood, and that the other defendant has more than seven-eighths white blood (R. 93).

If the statutory definition and the instruction to the jury are taken literally so as to require proof about "blood" (or even if "blood" is taken to mean "ancestors"), there was a complete absence of proof of an essential element of the crime and the conviction denied due process under *Thompson v. Louisville*, 362 U. S. 199. There was no attempt to prove that appellant Hoffman had more than seven-eighths "white blood" or that appellant McLaughlin had more than one-eighth "Negro blood." Such an effort would have been doomed to failure. In the first place, the notion of "Negro blood" and "white blood" rests on the misconception, entirely contrary to the known facts but nevertheless common, that there is some identifiable difference between "Negro blood" and "white blood."²⁴ Secondly,

²⁴ See Montague, *op. cit. supra* at 287, 288:

"The blood of all human beings is in every respect the same, with only two exceptions, that is, in the agglutinating prop-

there was still a failure of proof even using the idea that the statute refers to ancestors. The definition in §1.01(6) is circular insofar as it uses the notion of "Negro blood" to define the word "Negro" and meaningless in its use of "African blood" to define "Negro." Obviously, there are citizens of African nations belonging to every ethnic and anthropological classification. But, in any event, there was no evidence to connect McLaughlin with Africa. The record shows only that he was born in La Ceiba,²⁵ Honduras (R. 82). Finally, blood has nothing to do with hereditary characteristics. Montague, *op. cit.*, Ch. 14.

The appearance test upon which Florida ultimately relies removes the last pretense of statutory clarity. It totally fails to provide a sufficiently definite standard to meet the requirements of due process. It is based on witnesses' and jurors' opinions of a person's race, depends on their shifting and subjective perceptions influenced by stereotypes

erties of the blood which yields the four blood groups and in the Rh factor. But these agglutinating properties of the four blood groups and the twenty-one serologically distinguishable Rh groups are present in all varieties of men, and in various groups of men they differ only in statistical distribution. This distribution is a matter not of quality but of quantity. There are no known or demonstrable differences in the character of the blood of different peoples, except that some traits of the blood are possessed in greater frequency by some than by others.

. . .

... In short, it cannot be too emphatically or too often repeated that in every respect the blood of all human groups is the same, varying only in the frequency with which certain of its chemical components are encountered in different populations. This similarity cuts across all lines of caste, class, group, nation, and ethnic group. Obviously, then, since all people are of one blood, such differences as may exist between them can have absolutely no connection with "blood."

²⁵ A Central American city, far from Africa; Rand-McNally *Cosmopolitan World Atlas*, p. 56.

and conditioned by their differing personal experiences. In the "never-never land" of the appearance test, a person's race is not an objective fact at all, but depends entirely on other persons' views of him. Differences of opinion and perception as to the race of persons are a commonplace of life which inevitably flow from the multitude of unsatisfactory definitions. This standard obviously leaves the jurors to their own devices in determining race on any basis they choose. To make such a subjective *ad hoc* evaluation the basis for criminal conviction violates elemental standards of fairness. To make a man conduct himself on the basis of a preliminary guess as to what his race will be in the opinion of some future unknown witnesses and jurors who will use no precise standards places liberty on a slippery surface unworthy of a civilized system of criminal law. Cf. *Connally v. General Construction Co.*, 269 U. S. 385. This test is easily as nebulous as the phrase "known to be a member of a gang" and the term "gangster" in the New Jersey law invalidated in *Lanzetta v. New Jersey*, 306 U. S. 451. The vagueness of legal definitions of race is a substantial reason why the creation of crimes depending on the race of parties violates the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

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APPENDIX

STATES REPEALING MISCEGENATION LAWS IN RECENT YEARS

1. *Arizona* (1962): Laws 1962, ch. 14, §1, deleting a portion of Ariz. Rev. Stat. §25-101 (1956).
2. *California* (1959): Stat. 1959, ch. 146, §1, at 2043, repealing Cal. Civ. Code §§60, 69 (1954).
3. *Colorado* (1957): Colorado Laws 57, §1, at 334, repealing Colo. Rev. Stat. §§90-1-2, 90-1-3 (1953).
4. *Idaho* (1959): Laws 1959, ch. 44, §1, at 89, deleting Idaho Code Ann. §32-206 (1947).
5. *Montana* (1953): Laws 1953, ch. 4, sec. 1, repealing Laws 1909, ch. 49, secs. 1-5.
6. *Nebraska* (1963): Neb. Sess. Laws, at 736 (1963), repealing Rev. Stat. of Neb. §§42-163, 42-328 (1948).
7. *Nevada* (1959): Nev. Stat. 1959, at 216, 217, repealing Nev. Rev. Stat. tit. 11, ch. 122, 180 (1957).
8. *North Dakota* (1955): N.D. Stat. 1955, ch. 246, §1, repealing N.D. Code §14-03-04.
9. *Oregon* (1951): O. R. S. §106.210 (1963), repealing Ore. Code Law Ann. §§23-1010, 63-102.
10. *South Dakota* (1957): S.D. Sess. Laws 1957, ch. 38, repealing S.D. Code §14-990 (1939).
11. *Utah* (1963): Sess. Laws 1963, ch. 43, repealing Utah Stat. §30-1-2 (1953).

STATES REPEALING MISCEGENATION LAWS IN LAST CENTURY

1. *Iowa*: Omitted—1851.
2. *Kansas*: Omitted—1857. Laws c. 49 (1857).
3. *Maine*: Repealed 1883. Laws p. 16 (1883).
4. *Massachusetts*: Repealed 1840. Acts, c. 5 (1843).
5. *Michigan*: Prior interracial marriages legalized in 1883. Act 23, p. 16 (1883).
6. *New Mexico*: Repealed 1886. Laws p. 90 (1886).
7. *Ohio*: Repealed 1887. Laws p. 34 (1887).
8. *Rhode Island*: Repealed 1881. Acts, Jan. Sess. p. 108 (1881).
9. *Washington*: Repealed 1867. Laws pp. 47-48 (1867).

STATES NEVER ENACTING STATUTES WHICH PROHIBIT INTERRACIAL MARRIAGE

- | | | |
|----------------------|-----------------------|-------------------------|
| 1. <i>Alaska</i> | 2. <i>Connecticut</i> | 3. <i>Hawaii</i> |
| 4. <i>Illinois</i> | 5. <i>Minnesota</i> | 6. <i>New Hampshire</i> |
| 7. <i>New Jersey</i> | 8. <i>New York</i> | 9. <i>Pennsylvania</i> |
| 10. <i>Vermont</i> | 11. <i>Wisconsin</i> | |

STATES AT PRESENT PROHIBITING
INTER-RACIAL MARRIAGES
(PENALTIES FOR INFRACTIONS
ARE INDICATED)

1. *Alabama*: Ala. Const. §102; Ala. Code, Tit. 14, §360 (1958); 2-7 imprisonment (*idem.*).
2. *Arkansas*: Ark. Stat. §55-104 (1947); 1 year imprisonment and/or \$250 fine (Ark. Stat. §41-106).
3. *Delaware*: Del. Code Ann., Tit. 13, §101 (1953); \$100 fine in default of which imprisonment for not more than 30 days (Del. Code Ann., Tit. 13, §102).
4. *Florida*: Fla. Const. art. XVI, §24; Florida Stat. §741.11 (1961); maximum 10 years imprisonment and/or maximum fine of \$1,000 (Fla. Stat. §741.12).
5. *Georgia*: Ga. Code Ann., §53-106 (1933); 1 to 2 years imprisonment (Ga. Code Ann. 53-9903).
6. *Indiana*: Ind. Ann. Stat. §44-104 (Burns, 1952); imprisonment of 1 to 10 years and fine of \$100-1000 Ind. Ann. Stat. (Burns, 1952) §10-4222.
7. *Kentucky*: Ky. Rev. Stat. §402.020 (1943); fine of \$500 to \$1000 and if violation continued after conviction, imprisonment of 3 to 12 months (K.R.S. §402.990).
8. *Louisiana*: La. Civil Code Art. 94 (Dart, 1945); 5 years imprisonment (La. Rev. Stat. Ch. 14, §79).
9. *Maryland*: Md. Ann. Code Art. 27, §398 (1957); imprisonment from 18 months to ten years (*idem.*).
10. *Mississippi*: Miss. Const. art. 14, §263; Miss. Code Ann. §459 (1942); Imprisonment up to 10 years (Miss. Code Ann. §2000, 1960).
11. *Missouri*: Mo. Rev. Stat. §451.020 (1959); 2 years in state penitentiary; and/or a fine of not less than \$100, and/or imprisonment in county jail for not less than 3 months (Mo. Rev. Stat. §563.240).

12. *North Carolina*: N. C. Const. art. XIV, §8; N. C. Gen. Stat. §51-3 (1953); 4 months to 10 years imprisonment (N. C. Gen. Stat. §14-181).
13. *Oklahoma*: Okla. Stat., Tit. 43, §12 (1961); 1 to five years and up to \$500 fine (Okla. Stat., Tit. 43, §13).
14. *South Carolina*: S. C. Const. art. 2, §34; S. C. Code §20-7 (1952); imprisonment for not less than 12 months, and/or fine of not less than \$500 (*idem.*).
15. *Tennessee*: Tenn. Const. art. (11), §14; Tenn. Code Ann. §36-402 (1956); 1 to 5 years imprisonment, or, on recommendation of jury, fine and imprisonment in county jail (Tenn. Code Ann. §36-403).
16. *Texas*: Tex. Rev. Civ. Stat. art. 4607 (1948); 2 to 5 years imprisonment (Tex. Penal Code art. 492).
17. *Virginia*: Va. Code Ann. §20-54 (1953); 1 to 5 years (Va. Code Ann. §20-59).
18. *West Virginia*: W. Va. Code Ann. §4697.
19. *Wyoming*: Wyo. Stat. §20-18 (1957); \$1000 fine and/or imprisonment up to 5 years (Wyo. Stat. §20-19).

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IN THE
Supreme Court of
The United States
WASHINGTON, D. C.

NO. 11

OCTOBER TERM, 1964

DEWEY McLAUGHLIN, et al.,

Appellants,

-vs-

STATE OF FLORIDA

Appellee.

BRIEF OF APPELLEE

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On Appeal from the
Supreme Court of the State of Florida

TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
QUESTIONS PRESENTED	3
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	7
ARGUMENT	
QUESTION ONE	10
QUESTION TWO	45
QUESTION THREE	53
QUESTION FOUR	56
QUESTION FIVE	60
CONCLUSION	62
PROOF OF SERVICE	63
APPENDIX:	Post 63
"A" Brief of Appellants submitted to Florida Supreme Court	

TABLE OF CITATIONS

CASES:	PAGE
Adamson vs. People of the State of California 332 U.S. 46, 76	11
Ansin vs. Thurston, 101 So.2d 808	49
Brown vs. Topeka Board of Education, 347 U.S. 483	41, 61
Burnette vs. Green, 97 Fla. 1007, 122 So. 570, 69 A.L.R. 244	57
Butler vs. Perry, 67 Fla. 405, 66 So. 150	50
Crawford vs. State, 86 Fla. 94, 97 So. 288	57
Durley vs. Mayo, 351 U.S. 277, 100 L.Ed. 1178, 76 S.Ct. 806	52
Ex parte Bain, 121 U.S. 1, 12	10
Ex parte Kinney, 14 Fed. Cases 602, 3 Hughes 1	30
Ex rel William B. Hobbs and Martha A. Johnson, 1 Woods 537	38
Ferrell vs. State, 34 So. 220, 45 Fla. 26	50
Gideon vs. Wainwright, 372 U.S. 335, 9 L.Ed. 2d 799, 82 S.Ct. 792	61
Grace vs. State, 55 So. 2d 495	47
Gurr vs. State, 7 So.2d 590	48
Hysler vs. State, 85 Fla. 153, 95 So. 573	57

In re Lampitoe, 232 F. 382	58
In re Young, 198 F. 717	58
J. J. Carter Furniture Company vs. Banks 11 So.2d 776	50
Kennedy vs. Walker, 63 A.2d 589, 135 Conn. 262, affirmed 93 L.Ed. 1715, 337 U.S. 901, 69 S.Ct. 1046	37
Levy's Lessee vs. McCartee, 31 U.S. 102, 6 Peters 102	58
Maillard vs. Lawrence, 57 U.S. 251	58
McGowan vs. Maryland, 366 U.S. 420, 6 L.Ed.2d 393, 81 S. Ct. 1101	56
Mercer vs. Reynolds, 317 Mich. 632, 27 N.W. 2d 40	59
Morrison vs. State of California, 291 U.S. 82	58
Name vs. Name, 87 S.E.2d 749, 197 Va. 80, 350 U.S. 891, 100 L.Ed. 784, 350 U.S. 985, 100 L.Ed. 852	39
Orr vs. State, 129 Fla. 398, 176 So. 510	47, 48, 49
Pace vs. Alabama, 106 U.S. 583	38
People vs. Cotton, 2 Utah 457	47
Perez vs. Sharp, 32 Cal. 2d 711, 198 P.2d 17	38
Purity Extract and Tonic Company vs. Lynch, 226 U.S. 192	42
Ridgeway vs. Cockburn, 296 N.Y. Supp. 936	59

Rossi vs. U. S., 289 U.S.89, 77 L.Ed. 1051	46
Roth vs. U.S., 254 U.S. 476, 1 L.Ed.2d 1498, 775 S.Ct. 1304	59
Scott vs. Georgia, 39 Ga. 323	39
Solomon vs. Sanitarions' Registration Board, 147 So.2d 132	49
State vs. Gibson, 36 Ind. 389, 10 Amer. Repts. 42	39
State vs. McDuffie, 12 SE 83	47
State vs. Tutty, 41 Fed. 753	38
State vs. Naylor 136 P. 889	47
Stevens vs. U.S., 146 F.2d 120	44
Thomas vs. State, 36 Fla. 109, 18 So. 331	57
Tracy vs. State, 130 So.2d 605	57
Ullmann vs. U.S., 350 U.S. 429, 501	11
United States vs. Bhagat Singh Thind, 361 U.S. 204, 126 F.2d 1021	43
United States vs. Coombs, 37 U.S. 72	58
United States vs. La Coste, 26 F. Cases 526, 2 Mason 129	58
United States vs. Pape, 144 F.2d 778	46
United States vs. Perryman, 100 U.S. 236	59
Wadia vs. United States, 101 F.2d 7	58

FEDERAL CONSTITUTION AND STATUTES:

	Page
Article V U. S. Constitution	10, 60
Thirteenth Amendment U. S. Constitution	59
Fourteenth Amendment U. S. Constitution	7, 9, 38, 59
Fifteenth Amendment U. S. Constitution	36
14 Statutes 173	20

FLORIDA CONSTITUTION AND STATUTES:

Article V, Section 4	
Section 1.01, Florida Statutes	57
Section 798.02, Florida Statutes	2, 55
Section 798.03, Florida Statutes	2
Section 798.05, Florida Statutes	7, 55
Section 918.10, Florida Statutes	52
Section 924.23, Florida Statutes	52

TEXTBOOKS AND OTHER AUTHORITIES:

	Page
53 C. J.S., Lewdness, Section 5	47
Congressional Globe, 39th Congress, First Session	11-36
Civil Rights Act	11, 12, 20, 23, 35, 36

THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (Ten Brock)	30
--	----

THE ADOPTION OF THE FOURTEENTH AMENDMENT (Flack)	30
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IN THE
Supreme Court of
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NO.

OCTOBER TERM, 1964

DEWEY McLAUGHLIN, et al.,

Appellants,

-vs-

STATE OF FLORIDA

Appellee.

BRIEF OF APPELLEE

OPINION BELOW

The statement contained in appellants' brief with reference to the opinion below is satisfactory.

JURISDICTION

The statement contained in appellants' brief with reference to jurisdiction is satisfactory.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Provisions (1) - (6) as set out in appellants' brief are satisfactory; however, the state finds it necessary to add the following as applicable:

(7) This case involves an addition to the six provisions set out in appellants' brief:

Section 798.02, Florida Statutes:

Lewd and lascivious behavior. If any man and woman, not being married to each other, lewdly and lasciviously associate and cohabit together, or if any man or woman, married or unmarried, is guilty of open and gross lewdness and lascivious behavior, they shall be punished by imprisonment in the state prison not exceeding two years, or in the county jail not exceeding one year, or by fine not exceeding three hundred dollars.

(8) In addition to Section 798.02, Florida Statutes, and the six provisions set out in appellants' brief, this case also involves Section 798.03, Florida Statutes, which provides the following:

Fornication.—If any man commits fornication with a woman, each of them shall be punished by imprisonment not exceeding three months, or by fine not exceeding thirty dollars.

QUESTIONS PRESENTED

I

WHETHER THE FOURTEENTH AMENDMENT AFFECTS STATE ANTI-MISCEGENATION LAWS OR STATUTES.

II

WHETHER THE QUESTION OF THE CONSTITUTIONAL VALIDITY OF STATE ANTI-MISCEGENATION LAWS IS PRESENT IN THE INSTANT CASE.

III

WHETHER THE DEFENDANTS, BY BEING PROSECUTED UNDER A STATUTE WHICH PROHIBITS INTERRACIAL COHABITATION, WERE DENIED EQUAL PROTECTION AND DUE PROCESS OF LAW, AS SUCH TERMS ARE ENCOMPASSED BY THE PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

IV

WHETHER THE WORD NEGRO AS USED IN SECTION 798.05, FLORIDA STATUTES, RENDERS SUCH SECTION SO AMBIGUOUS AS TO LEAVE APPELLANTS UNNOTIFIED THAT THEIR ACTION WAS PROHIBITED.

**WHETHER THE PROVISIONS OF THE AL-
LEGED FOURTEENTH AMENDMENT OF THE
FEDERAL CONSTITUTION WERE VALIDATED
AS REQUIRED BY ARTICLE V OF THE
UNITED STATES CONSTITUTION.**

STATEMENT OF THE CASE

The following represents a temporal arrangement of the circumstances applicable to the present case; each of such circumstances is supported by a reference to that portion of the record (designated by the letter "R") which verifies its existence.

On the 12th of January, 1961, in the city of Miami Beach, appellant Dewey McLaughlin applied for a civilian registration employment card (R 73). In response to the specific question of whether he was married, single, separated, divorced, or widowed, he answered that he was separated from his wife, Willie McLaughlin (R 74, 75, 78).

In April of 1961, appellant Connie Hoffman commenced to reside at an apartment owned by one Mrs. Dora Goodick (R 21, 22). During the initial portion of such residence, appellant Hoffman lived with a white man named Hoffman, whom she introduced as her husband (R 22, 28). She registered as Connie Hoffman. (see State's Exhibit I in the record).

In December of 1961, the appellant McLaughlin commenced living with the appellant Hoffman (R 23, 29, 30, 31). In February, 1962, Mrs. Goodick reported to the police the circumstances concerning the cohabitation of appellants. (R 23).

On February 23, 1962, Officers Stanley Marcus and Nicolas Valeriana made an investigation of the premises wherein appellants were living, pursuant to information they were cohabiting illegally and that Connie Hoffman's minor child was not receiving proper care (R 33, 36, 39, 46, 50).

Appellants admitted to the officers that they had been living together and having sexual relationships for several weeks (R 53, 54). Such investigation terminated without prosecution for the illegal cohabitation (R 54). Five days later, however, upon further information that appellants were continuing to live together, both were arrested (R 55).

On March 1, 1962, information was filed charging the appellants with having habitually lived in and occupied in the nighttime the same room in violation of Section 798.05, Florida Statutes (R 3). On March 5, 1962, appellant Hoffman was interviewed by the state Department of Public Welfare (R83). Such interview revealed that appellant Hoffman lived in a common-law relationship with one Robert Gonzalez in the year 1956 (R 83); that she had never married Gonzalez because she had never had a legal divorce; that she lived with Mr. Hoffman, but had never legally

married him (R 83); that in October, 1961, she had commenced living with Mr. McLaughlin as her common-law husband, but was not married to him (R 84), and then stated that there had been no marriages and no divorces (R 84). Appellant Hoffman told the welfare agent, while discussing the present case, that she herself was white, and that McLaughlin was Negro (R 84).

On April 11, 1962, a motion to quash the information was filed in behalf of both appellants (R 5). Such was denied on April 12, 1962 (R 6). Jury trial commenced on June 27, 1962 (R 18). On June 28, 1962, such trial terminated with a verdict of guilty (R 7). On the same date, defendants each were adjudged guilty and sentenced to one month in the county jail and a fine of \$150.00 (R 8). Motion for new trial was denied on July 3, 1962 (R 11).

Appropriate appeal was taken to the Florida Supreme Court (R 1). Such appeal initially raised all errors presently submitted to this court (R 12); however, in briefing the questions and in petitioning for rehearing, the appellants abandoned their position that the statute under which they were prosecuted was vague and indefinite (R 103). (See also appendix "A" to appellee's brief wherein there is contained a photostatic copy of the only brief presented to the Florida Supreme Court by the appellants). The Florida Supreme Court rendered an opinion affirming the conviction (R 99). Appellants then took appropriate appeal to this court, and after a finding of probable jurisdiction, the case arrived at its present status.

ARGUMENT SUMMARY

Appellants have presented three issues to the court, to wit:

(1) That they were denied their rights under the Fourteenth Amendment by the court's instructing the jury that a defense of common-law marriage would not be available to the appellants if such marriage was undertaken in the state of Florida;

(2) That Section 798.05, Florida Statutes, violates the provisions of the Fourteenth Amendment by placing interracial cohabitation in an unfavored classification when compared to intraracial cohabitation;

(3) That Section 798.05, Florida Statutes, which prohibits habitual cohabitation between a negro and white male-female is unconstitutional under the federal constitution because of vagueness caused by the use of the term "Negro".

With regard to issue (1), the state's position is that in interpreting the meaning of the terminology used in the Fourteenth Amendment, the national congress concluded that such amendment would not affect anti-miscegenation laws or give unto the negro the right to vote. The continuation of the state anti-miscegenation laws after the adoption of the Fourteenth Amendment clearly indicates that the majority of the state legislatures, at the time they ratified the Fourteenth Amendment, had no intent nor understanding that it would affect anti-miscegenation laws. The

courts' opinions contemporary with the adoption of the Fourteenth Amendment unanimously sustained anti-miscegenation laws which were tested, thereby indicating that the courts of that era, who had the advantage of more intimate knowledge of the intent of the legislature at the time of the passing of the Fourteenth Amendment, were of the judicial opinion that such did not invalidate anti-miscegenation statutes. The state further urges that the issue of the effect of the Fourteenth Amendment on anti-miscegenation laws is not present in the instant case, because the trial court's removal of the possible defense of a common-law marriage in this state was legally justified on an entirely distinct basis, to wit: the defendants had not carried the burden of proving such negative and were therefore not entitled to such defense. Insomuch as there is a correct basis for negating the defense of having formulated a common-law marriage in the State of Florida, the fact that the court cited an erroneous reason for the correct deprivation is of no consequence.

With regard to issue (2), the appellee urges that appellants are in error in their assertion that Florida has not made habitual cohabitation a crime when such act is committed by unmarried members of the same race. Section 798.02, Florida Statutes, prohibits lewd and lascivious behavior and it will be demonstrated that habitual cohabitation by unmarried members of the same race is punishable under such section. It will further be demonstrated that the permissible punishment under Section 798.02, supra, is at least as great

as the maximum punishment provided by Section 798.05, under which appellants were charged.

With regard to issue (3), the state will point out that Florida law provides that one who does not argue and brief an assignment of error during appeal is considered to have abandoned such error. The state will demonstrate that appellants did not argue in the Florida Supreme Court the ambiguity of the Florida statute, and therefore there was adequate state ground for concluding against appellants on the question of whether the statute was ambiguous, such ground being that the question was not properly before the court.

It is further urged that an unbroken line of decisions as well as practices has recognized that the term "negro" has at least as much clarity as the term "obscene", which latter term has been recognized as not being so ambiguous as to leave a statute using such term unconstitutional.

It is further to be pointed out that many cases have upheld statutes wherein the term "negro" was totally undefined, whereas in Florida such term is clearly defined to a mathematical exactness and therefore, a fortiori, a statute wherein the term "negro" is concisely defined is not, as a matter of constitutional law, ambiguous.

The state will present as a collateral argument the issue that the Fourteenth Amendment was proposed

in violation of Article V of the federal constitution, because $\frac{2}{3}$ of the Senate did not approve such proposal. It will be urged that a decision upholding the adoption of the Fourteenth Amendment will jeopardize the immediate power of the United States Supreme Court itself, because it would support the proposition that 51% of the members of the federal legislative houses could bind together to unseat the other 49%, and then propose a constitutional amendment to place federal judicial power in the state courts. It is clear that the subject matter of such amendment would assure quick ratification by the state legislatures. It is submitted that the purpose of the constitution is to insure stability and to guarantee against such occurrences, and that such purpose can only be assured by a holding that the proposal of the Fourteenth Amendment was improper, invalid, and ineffective.

ARGUMENT

QUESTION I

WHETHER THE FOURTEENTH AMENDMENT AFFECTS THE STATE ANTI-MISCEGENATION STATUTES.

A cardinal rule involved in the interpretation or construction of the Constitution or one of its provisions is that:

"... we are to place ourselves as nearly as possible in the condition of the men who framed that instrument."¹

Furthermore, in interpreting or construing, "nothing new can be put into the constitution except through the amendatory process. Nothing old can be taken out without the same process."²

The three constitutional amendments which grew out of the War Between the States were designed to limit the powers of the State. The previous amendments limited the powers of Federal Government.

The Fourteenth Amendment grew out of the Civil Rights Act of 1866 and its forerunner, the Freedmen's Bureau Bill. It therefore becomes necessary that the debates in the 1st Session of the 39th Congress (1865-1866) be researched in order to determine the meaning of the pertinent language of the Fourteenth Amendment as understood by its authors and its proponents.

The first material occurrence was the introduction of the supplemental Freedmen's Bureau Bill.³ This bill was the first reconstruction proposal and was

¹ *Adams vs. People of California*, 332 U.S. 46, 72, (1947). *Ex Parte Bain*, 121 U.S. 1, 12, (1887):

² *Ullmann vs. United States*, 350 U.S. 429, 501, (1956)

³ S. 60, 39th Congress, 1st Session (1866).

a forerunner of the Fourteenth Amendment. It was introduced as a supplement to the original Freedmen's Bureau Bill enacted in March, 1865. The original protected only those Negroes who had been freed in territory under federal control. The supplemental bill, as reported by the Judiciary Committee of the Senate, contained a number of sections, the first six of which authorized the division of the seceding states into districts, the appointment of commissioners, the reservation of land, and the awarding of such lands to loyal refugees and freedmen.

The seventh section contained language which, by way of the Civil Rights Act, subsequently became a part of the Fourteenth Amendment. It provided, in part, that if, because of any state or local law, custom or prejudice:

"... any of the civil rights of immunities belonging to white persons, including the right to make and enforce contracts . . . and to have full and equal benefit of all laws and proceedings for the security of person and estate, are refused or denied to negroes . . . on account of race . . . it shall be the duty of the President of the United States, through the Commissioner, to extend military protection . . . over all cases affecting such persons so discriminated against."

* Senate Document, 39th Cong., 1st Session, Ex Doc. No. 24, p. 9.

Section 8 made it a misdemeanor for any person to subject any other person on account of color:⁵

“... to the deprivation of any civil right secured to white persons, or to any different punishment...”.

These provisions of the bill were applicable only to those states or districts where the ordinary course of judicial proceedings had been interrupted by war. Tribunals consisting of officers and agents of the Bureau were to try all offenses.⁶

Senator Thomas A. Hendricks of Indiana, an opponent of the Bill, expressed the fear in the Senate debates that the “civil rights or immunities” clause in the seventh section would nullify many salutary laws of Indiana, including an Indiana constitutional provision which provided that no Negro man should be allowed to intermarry with a white woman. He then said:⁷

“Marriage is a civil contract, and to marry according to one’s choice is a civil right. Suppose a State shall deny the right of amalgamation, the right of a negro man to intermarry with a white woman, then that negro may be taken under the mili-

⁵ Ibid.

⁶ Ibid. See also, Cong. Globe, 39th Cong., 1st Sess. (1866) 209-10.

⁷ Cong. Globe, 39th Cong., 1st Sess. 318 (January 19, 1866).

tary protection of the Government; and what does that mean? . . . Does it mean that this military power shall enforce his civil right, without respect to the prohibition of the local law? In other words, if the law of Indiana, as it does, prohibits under heavy penalty the marriage of a negro with a white woman, may it be said a civil right is denied him which is enjoyed by all white men, to marry according to their choice, and if it is denied, the military protection of the colored gentlemen is assumed, and what is the result of it all? I suppose they are then to be married in the camp of the protecting officer without regard to the State laws. . . ."

Senator Lyman Trumbull of Illinois, who had introduced the Bill and was its manager, made it clear that there was no intention to nullify the anti-miscegenation statutes or constitutional requirements of the various states or to restrict such future legislation as to miscegenation. On that point he said:"

" . . . But, says the Senator from Indiana, we have laws in Indiana prohibiting black people from marrying whites, and you are going to disregard these laws? Are our laws enacted for the purpose of preventing amalgamation to be disregarded, and is a man to be punished because he undertakes to enforce them? I beg the Senator from Indiana to read the bill. One of its objects is to secure the

* Cong. Globe, 39th Cong., 1st Sess. 322 (January 19, 1866).

same civil rights and subject to the same punishments persons of all races and colors. How does this interfere with the law of Indiana preventing marriages between whites and blacks? Are not both races treated alike by the law of Indiana? Does not the law make it just as much a crime for a white man to marry a black woman as for a black woman to marry a white man, and vice versa? I presume there is no discrimination in this respect, and therefore your law forbidding marriages between whites and blacks operates alike on both races. This bill does not interfere with it. If the negro is denied the right to marry a white person, the white person is equally denied the right to marry the negro. I see no discrimination against either in this respect that does not apply to both. Make the penalty the same on all classes of people for the same offense, and then no one can complain."

A week later Senator Garrett Davis from Kentucky likewise expressed the fear that the language of Section 7 was broad enough to strike down the anti-miscegenation laws of the State of Kentucky.⁹

Senator Trumbull replied:¹⁰

"... The Senator says the laws of Kentucky forbid a white man or woman marrying a negro, and that these laws of Kentucky are to exist forever;

⁹ Cong. Globe, 39th Cong., 1st Sess., 418.

¹⁰ Cong. Globe, 39th Cong., 1st Sess., 420.

that severe penalties are imposed in the State of Kentucky against amalgamation between the white and black races. . . .

"But, sir, it is a misrepresentation of this bill to say that it interferes with those laws. I answered that argument the other day when it was presented by the Senator from Indiana. The bill provides for dealing out the same punishment to people of every color and every race; and if the law of Kentucky forbids the white man to marry the black woman I presume it equally forbids the black woman to marry the white man, and the punishment is alike upon each. All this bill provides for is that there shall be no discriminations in punishments on account of color; and unless the Senator from Kentucky wants to punish the negro more severely for marrying a white person than a white for marrying a negro, the bill will not interfere with his law."

The supplemental bill passed the Senate on January 25, 1866, by a vote of 37 to 10, three absent.

On the same day the Bill was sent to the House of Representatives, but on the following day Senator Johnson from Maryland made a motion to reconsider requesting that the Secretary of the Senate ask for the return of the Bill from the House of Representatives. Senator Johnson's motion was defeated 22 to 18.

While the Bill was under consideration in the House of Representatives, on February 3, 1866, Representa-

tive Samuel W. Moulton from Illinois demonstrated the inapplicability of the language of the bill to state laws forbidding miscegenation or interracial marriages. In part he said:¹¹

"My colleague says that . . . it is a civil right for a black man to marry a white woman. . . . I deny that it is a civil right for a white man to marry a black woman or for a black man to marry a white woman. . . . It is a matter of mutual taste, contract, and understanding between the parties. . . . The law, as I understand it, in all the States, applies equally to the white man and the black man, and there being no distinction, it will not operate injuriously against either the white or the black. . . .

"I understand that the civil rights referred to in the bill are not of the fanciful character referred to by the gentleman, but the great fundamental rights that are secured by the Constitution of the United States, and that are defined in the Declaration of Independence, the right to personal liberty, the right to hold and enjoy property, to transmit property, and to make contracts. These are the great civil rights that belong to us all, and are sought to be protected by this bill."

Thereupon, the following colloquy occurred:¹²

¹¹ Ibid., p. 632 (Feb. 3, 1866).

¹² Ibid., p. 632, 633 (Feb. 3, 1866).

"Mr. THORNTON. On the point upon which my colleague is now speaking, civil rights, I would ask him if a marriage between a white man and a white woman is a civil right?

"Mr. MOULTON. It is not a civil right.

"Mr. THORNTON. It is not?

"Mr. MOULTON. No, sir, not in my opinion.

"Mr. THORNTON. Then what sort of a right is it?

"Mr. MOULTON. Marriage is a contract between individuals competent to contract it.

"Mr. THORNTON. Is it a political or civil right?

"Mr. MOULTON. It is a social right. I understand that a civil right is a right that a party is entitled to and that he can enforce by operation of law.

"Mr. THORNTON. I would ask my colleague if marriages are not contracted in all the States of this Union by virtue of provisions of law?

"Mr. MOULTON. I think, perhaps, they are to a greater or less extent.

"Mr. THORNTON. It is not especially provided for by the law regulating it. The right to marry is a right which cannot be enforced.

There are a great many things a man can do that are imperfect obligations which cannot be enforced by law, and hence are not civil rights contem-

plated by this bill. . . . The remarks that I made in connection with this matter were made for this purpose: I say that the right to marry is not strictly a right at all, because it rests in contract alone between the individuals, and no other person has a right to contract it. It is not a right in any legal or technical sense at all. No one man has any right to marry any woman he pleases. If there was a law making that a civil right, then it might be termed a civil right in the sense in which it is used here. But there being no law in any state to that effect, I insist that marriage is not a civil right, as contemplated by the provisions of this bill. . . ."

On the same day, Hon. L. H. Rousseau of Kentucky, expressed the fear that under the proposal a minister might be arrested for refusing to solemnize marriages between whites and negroes.¹³

He was answered on the same day by Hon. C. E. Phelps of Maryland, even though he himself opposed the bill as written and desired amendments:¹⁴

"- - - Efforts have been made, and very ingeniously, by gentlemen opposed to the bill, - - - by arguing from the language used in the seventh and eighth sections an inference of a design to control state laws in respect to the marriage relation. Such a

¹³ Appendix to the Congressional Globe, 39th Cong., 1st Sess. (p. 69).

¹⁴ Ibid., p. 75.

construction is not warranted by the terms employed. - - -"

After final passage, the Freedmen's Bureau Bill was vetoed on February 19th, 1866.¹⁵ The veto was sustained February 2, 1866.

In a slightly modified form, the Bill was later re-enacted over the veto of the President.¹⁶

The Senate then proceeded to consider the proposed Civil Rights Act which was under the same management. The first section contained the following language:¹⁷

"The inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance,

¹⁵ Cong. Globe, 39th Cong., 1st Sess., p. 916.

¹⁶ 14 Statutes 173 (1866).

¹⁷ Ibid., p. 504.

regulation, or custom, to the contrary notwithstanding."

It also provided that:¹⁸

"--- there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery."

Again Senator Johnson expressed his misgivings about the possible effect of this act on the miscegenation statutes of the States. Among other things he said:¹⁹

"There is not a State in which these Negroes are to be found where slavery existed until recently, and I am not sure that there is not the same legislation in some of the States where slavery has long since been abolished, which does not make it criminal for a black man to marry a white woman, or for a white man to marry a black woman; and they do it not for the purpose of denying any right to the black man or to the white man, but for the purpose of preserving the harmony and peace of society. The demonstrations going on now in your free States show that a relation of that description cannot be entered into without producing some disorder. Do you not repeal all that legislation by this bill? I do not know that

¹⁸ Ibid., p. 505.

¹⁹ Ibid., p. 505.

you intend to repeal it; but is it not clear that all such legislation will be repealed, and that consequently there may be a contract of marriage entered into as between persons of these different races, a white man with a black woman or a black man with a white woman? - - - "

Thereupon, Senator William Pitt Fessenden, of Maine, asked:²⁰

"Where is the discrimination against color in the law to which the Senator refers?"

The following colloquy then took place:²¹

"Mr. JOHNSON. There is none, that is what I say; that is the very thing I am finding fault with.

Mr. TRUMBULL. This bill would not repeal the law to which the Senator refers, if there is no discrimination made by it.

"Mr. JOHNSON. Would it not? We shall see directly. Standing upon this section, it would be admitted that the black man has the same right to enter into a contract of marriage with a white woman as a white man has, that is clear, because marriage is a contract. I was speaking of this without a reference to any State legislation.

"Mr. FESSENDEN. He has the same right to make a contract of marriage with a white woman that a white man has with a black woman.

²⁰ Ibid., 505, 506

²¹ Ibid., p. 505, 506.

"Mr. JOHNSON. - - - But whether I am wrong or not, upon a careful and correct interpretation of the provisions of these two sections, I suppose all the Senate will admit that the error is not so gross a one that the courts may not fall into it. Then what is the result? The whole of this legislation to be found in almost every State in the Union where slavery has existed; and to be found, I believe, in several of the other States, is done away with. You do not mean to do that. I am sure the Senate is not prepared to go to that extent; and I submit to the honorable chairman, without proclaiming myself to be right beyond all possible question of doubt, which would be in bad taste, and certainly very far from what I am disposed to do when I find that a different opinion is entertained by two gentlemen whose opinions I hold in so much respect - I submit to the honorable chairman of the Judiciary Committee whether he had not better make it so plain that the difficulty which I suggest in the execution of the law will be obviated. - - -"

The Civil Rights Act of 1866 passed the Senate on February 2nd by a vote of 33 to 12.²² On March 13th with a few minor changes, it passed the House of Representatives by a vote of 111 to 38.²³ The House amendments were adopted in the Senate without debate.²⁴

²² Ibid., p. 916, (Feb. 19, 1866).

²³ Ibid., p. 1367.

²⁴ Ibid., p. 1367.

On March 27, 1866, President Johnson returned the Bill to the Senate without his approval.²⁵ His veto message contained objections to the Bill, section by section. With respect to the anti-miscegenation laws of the states, he said:²⁶

"In the exercise of State policy over matters exclusively affecting the people of each State, it has frequently been thought expedient to discriminate between the two races. By the statutes of some of the States, northern as well as southern, it is enacted, for instance, that no white person shall intermarry with a negro or mulatto. Chancellor Kent says, speaking of the blacks, that 'marriages between them and the whites are forbidden in some of the States where slavery does not exist, and they are prohibited in all the slaveholding states, and when not absolutely contrary to law, they are revolting, and regarded as an offense against public decorum.'

"I do not say this bill repeals State laws on the subject of marriage between the two races, for as the whites are forbidden to intermarry with the blacks, the blacks can only make such contracts as the whites themselves are allowed to make, and therefore cannot, under this bill, enter into the marriage contract with the whites.—
 " - - - If it be granted that Congress can repeal all State laws discriminating between whites and

²⁵ Ibid., p. 1679.

²⁶ Ibid., p. 1680.

blacks in the subjects covered by this bill, why, it may be asked, may not Congress repeal in the same way all State laws discriminating between the two races on the subjects of suffrage and office? If Congress can declare by law who shall hold lands, who shall testify, who shall have capacity to make a contract in a State, then Congress can by law also declare who, without regard to color or race, shall have the right to sit as a juror or as a judge, to hold any office, and finally, to vote in every State and Territory of the United States. As respects the Territories, they come within the power of Congress, for as to them, the law-making power is the Federal power; but as to the States no similar provisions exist, vesting in Congress the power to make rules and regulations for them. - - -"

The Act was vetoed by President Johnson on March 27, 1866.²⁷ The veto was overridden in the Senate, 33 to 15, on April 6, 1866,²⁸ and was overridden in the House 122 to 41 on April 9, 1866.²⁹

So far as our research discloses, all of the proponents of the supplemental Freedmen's Bureau Bill and the Civil Rights Act of 1866 were of one accord in insisting that there was nothing in those acts that could possibly be constructed as nullifying the anti-miscegenation laws of the various states. As we have

²⁷ Ibid., p. 1679.

²⁸ Ibid., p. 1809.

²⁹ Ibid., p. 1861.

seen, by March 27, 1866, the fears that the anti-miscegenation statutes would be repealed had so far vanished that President Johnson dismissed the objection as frivolous.

The supplemental Freedmen's Bureau Bill and the Civil Rights Act were taken up, debated and passed before the resolution proposing the Fourteenth Amendment came before the Congress for debate, but all had the same management and a part of the same package. The proposal to amend the Constitution preceded the passage of the Bill and the Act, but the debates on the proposed amendment came after consideration of the two.

When the 39th Congress convened in December 1865, Thaddeus Stevens, a Pennsylvania representative, proposed the creation of a joint committee on reconstruction consisting of six senators and nine representatives.³⁰ This proposal was adopted and the committee of fifteen prepared the resolution that was finally proposed as the Fourteenth Amendment. The debates on the supplemental Freedmen's Bureau Bill and the Civil Rights Act therefore serve to refine and define the language that later went into the Fourteenth Amendment. As is well known, the purpose of the Fourteenth Amendment was to confer power upon the Congress to enact such laws as were em-

³⁰ Ibid., p. 6 (1865).

bodied in the Bill and the Act. For example, on May 8, 1866, Thaddeus Stevens said that Section 1 of the proposed amendment and its other provisions:³¹

' - - - all are asserted, in some form or other, in our Declaration or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford 'equal' protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. - - - Some answer, 'Your civil rights bill secures the same things.' That is partly true, but a law is repealable by a majority. And I need hardly say that the first time that the South with their copperhead allies obtain the command of Congress it will be repealed - - -"

Representative Thaddeus Stevens thus contended that the purpose of the first section of the amendment was to write the Civil Rights Act into the Constitution without in any wise adding to the rights protected by the Act. Mr. Stevens discussed in specific terms: punishment for crime, means of redress, protective laws and the testimony in court, all of which were

³¹ Cong. Globe, 39th Cong., 1st Sess., p. 2459.

listed in the Act; he never hinted at any idea of broader application.

Representative William E. Finck of Ohio then stated that if the first section of the proposed amendment was necessary, the Civil Rights Act was unconstitutional.³² His colleague from Ohio, Representative James A. Garfield, disagreed, saying that the purpose of the first section of the Amendment was to prevent the repeal of the Civil Rights Act saying:³³

"The civil rights bill is now a part of the law of the land. But every gentleman knows it will cease to be a part of the law whenever the sad moment arrives when that gentleman's party comes into power. It is precisely for the reason that we propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it. For this reason, and not because I believe the civil rights bill unconstitutional, I am glad to see that first section here."

Representative M. Russell Thayer of Pennsylvania agreed with Mr. Garfield, saying:³⁴

³² Cong. Globe., 1st Sess., p. 2460-1.

³³ Ibid., p. 2462.

³⁴ Ibid., p. 2465.

"As I understand it, it is but incorporating in the Constitution of the United States the principle of the civil rights bill which has lately become a law, and that, not as the gentleman from Ohio (Mr. Finck) suggested, because in the estimation of this House that law cannot be sustained as constitutional, but in order, as was justly said by the gentleman from Ohio who last addressed the House, (Mr. Garfield,) that that provision so necessary for the equal administration of the law, so just in its operation, so necessary for the protection of the fundamental rights of citizenship, shall be forever incorporated in the Constitution of the United States."

Mr. Benjamin M. Boyer, of Pennsylvania, opposed the proposed amendment stating as one reason:³⁵

"the first section embodies the principles of the civil rights bill - - -"

Representative Henry J. Raymond of New York, Publisher of the *New York Times*, had been opposed to the Civil Rights Act because of its doubtful constitutionality. As to the proposed constitutional amendment, he said:³⁶

"And now, although that bill became a law and is now upon our statute-book, it is again proposed so to amend the Constitution as to confer upon Congress the power to pass it."

³⁵ Ibid., p. 2467.

³⁶ Ibid., p. 2502.

The foregoing illustrates the view of the framers of the Fourteenth Amendment in the House that the purpose of the first section of the Amendment was to place the provisions of the Civil Rights Act of 1866 beyond the reach of legislative repeal. That is the verdict of history, based on the facts material to the issue.³⁷

The resolution proposing the Fourteenth Amendment was adopted by the House of Representatives on May 10, 1866, by a vote of 128 to 37. The bill was called up for debate in the senate, on May 23, 1866.³⁸ Senator Jacob M. Howard of Michigan took the lead in presenting the resolution since Senator Fessenden of Maine, the Chairman of the Committee on Reconstruction, had not been well. He spoke at length on "privileges and immunities", as this clause, he apparently thought, contained the gist of Section 1. He considered this phrase incapable of accurate definition, but listed a great many that he thought it included. These were the first eight amendments of the Constitution together with some even less well defined privileges and immunities included in Article IV, Section 2. Despite the long list that he gave, a right to marry across lines of race and color was never mentioned. He went on.³⁹

³⁷ Ten Brock, *The Anti-Slavery Origins of the Fourteenth Amendment*, (1951) 183; Flack, *The Adoption of the Fourteenth Amendment* (1909) p. 81, 212.

³⁸ Cong. Globe, 39th Cong., 1st Sess., p. 2763.

³⁹ Ibid., p. 2766.

"The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect those great fundamental guarantees. How will it be done under the present amendment? As I have remarked, they are not powers granted to Congress, and therefore it is necessary, if they are to be effectuated and enforced, as they assuredly ought to be, that additional power should be given to Congress to that end. This is done by the fifth section of this amendment. - - - Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution."

But again, these guarantees have no reference to anti-miscegenation laws.

Senator Howard made clear his views on the last portion of the first section. He said that this portion:⁴⁰

"- - - does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man."

That is the general field in which the due process and equal protection clauses operate. They were not designed to wipe out all distinctions or discriminations

⁴⁰ Ibid., p. 2766.

based on race or color. Senator Howard made this clear by his reference to the right to vote:⁴¹

"But, sir, the first section of the proposed amendment does not give to either of these classes the the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a despotism."

Is a right to enter into an interracial marriage one of those "fundamentals rights"? Is it more "fundamental" than the right to vote? Howard could not have thought so. As to voting rights under Section 2, he said:⁴²

"It is very true, and I am sorry to be obliged to acknowledge it, that this section of the amendment does not recognize the authority of the United States over the question of suffrage in the several Staes at all; nor does it recognize, much less secure the right of sufferage to the colored race. I wish to meet this question fairly and frankly; I have nothing to conceal upon it; and I am perfectly free to say that if I could have my own way, if my preferences could be carried out, I certainly should

⁴¹ Cong. Globe, 39th Cong., 1st Sess. (1866) p. 2766.

⁴² Ibid., p. 2766.

secure suffrage to the colored race to some extent at least; - - - The committee were of opinion that the States are not yet prepared to sanction so fundamental a change as would be the concession of the right of suffrage to the colored race. We may as well state it plainly and fairly, so that there shall be no misunderstanding on the subject. It was our opinion that three fourths of the States of this Union could not be induced to vote to grant the right of suffrage, even in any degree or under any restriction, to the colored race."

Howard spoke also of the last section of the proposed Amendment. He added that Section 5 gave Congress power to pass laws,⁴³

" - - - appropriate to the attainment of the great object of the amendment."

Senator Benjamin L. Wade of Ohio on May 23, moved a substitute which contained the germ of the definition of citizenship.⁴⁴ Further consideration was then postponed.

The Senate Republicans went into caucus where no doubt most of the basic differences were threshed out. Of the debates there we have no record. On May 29, the Senate returned to a consideration of the proposed amendment. Senator Howard at once offered a series of amendments, the product of the caucus.⁴⁵

⁴³ Ibid., p. 2766.

⁴⁴ Ibid., p. 2768.

⁴⁵ Ibid., p. 2869.

The only amendment proposed for Section 1 was the addition of the clause defining citizenship.

When asked as to the purpose of the proposed amendment, on May 30th, Howard said:⁴⁶

"We desired to put this question of citizenship and the rights of citizens and freedmen under the civil rights bill beyond the legislative power - -"

Some debate followed on the citizenship provisions. Then Senator James R. Doolittle of Wisconsin asserted that the Amendment was designed to validate the Civil Rights Act.⁴⁷ Senator Fessenden denied that he had heard such a purpose mentioned in the Committee, but he had missed many sessions and Senator Howard interposed to remark that the purpose of the amendment was to prevent the repeal of the Civil Rights Act.⁴⁸

Senator Luke P. Poland of Vermont made a speech in which he stated that the purpose of Section 1 was to permit Congress to prohibit State interference with the privileges and immunities referred to in Article IV, Section 2.⁴⁹ He admitted that the proposed amendment would not confer suffrage on the Negro. Senator William M. Stewart of Nevada renewed the

⁴⁶ Ibid., p. 2896.

⁴⁷ Ibid., p. 2896.

⁴⁸ Ibid.

⁴⁹ Ibid., p. 2961.

general theme that the proposed amendment was designed to put the Civil Rights Act in the Constitution.⁵⁰

Senator Garrett Davis of Kentucky, an opponent of the proposed amendment, spoke at length. He expressed the view that the amendment was designed to provide constitutional support for the Civil Rights Act.⁵¹ He was followed by Senator John B. Henderson, a Republican from Missouri. He implied that the proposed amendment would accomplish only the same result as the Civil Rights Act.

Thus the verdict of the House and history was affirmed in the Senate debates. The vote was then taken - June 8, 1866 - and the resolution was adopted by a vote of 33 to 11.⁵²

The resolution went back to the House for concurrence in the Senate amendments. Debate was limited to one day. Mr. Rogers stated that the resolution "embodied the gist of the civil rights bill."⁵³ The House concurred with the Senate amendments on June 13 by a vote of 120 to 32.⁵⁴

Thus, we have covered the ground and must conclude that the friends and foes of the Fourteenth Amendment, who spoke on the subject, were of the opinion that the purpose of the amendment was

⁵⁰ Ibid., p. 2964.

⁵¹ Id. at App. p. 240.

⁵² Id. at p. 3042.

⁵³ Id. at App. p. 229.

⁵⁴ Id. at p. 3149.

to validate the provisions of the Civil Rights Act and place them beyond the power of the Judiciary to nullify, and the power of the Congress to repeal.

It was the opinion of those who spoke in behalf of the Civil Rights Act that it had no application to marriage contracts, anti-miscegenation statutes or the right of suffrage. The proponents of the Civil Rights Act seemed to convince all of the sceptical members of the Congress and President Johnson, as well, that nothing in that Act applied to the antimiscegenation statutes of the states.

Since all the slave states and many of the non-slave states had anti-miscegenation statutes, it would have been strange if a majority of the members of the Congress from those latter states had intended to authorize the Congress or the courts to nullify that which their constituency favored.

However, a majority favored extending to Negroes - not the right to vote - but the right not to be discriminated against in voting. Nothing in the Civil Rights Act, legitimized by the Amendment, nor in the Amendment itself, accorded the right to vote or, as some thought, the right not to be discriminated against in the application of voting laws, it was necessary to frame and adopt the Fifteenth Amendment in order to accomplish the objective left untouched by the Fourteenth. In a few words the right to racially integrate at the altar or in bed might have been constitutionalized in the Fourteenth or the Fifteenth

Amendment. Such was not done. Had it been done, surely the Amendments would have lost.

If "we are to place ourselves as nearly as possible in the condition of the men who framed" the Fourteenth Amendment, we know that nothing in that Amendment, so interpreted, authorizes federal interference with the anti-miscegenation laws of the states. If "nothing new can be put into the Constitution except through the amendatory process", as was true in 1866, as was true in 1956, and as is true now, the current attacks on the miscegenation statutes of Florida must surely fail.

It has been held that the intent of the state legislatures in ratifying proposed amendments to the United States Constitution is controlling, rather than the intent of the federal legislature in proposing such amendments (see *Kennedy vs. Walker*, 63 A.2d, 589, 135 Conn. 262; affirmed 93 L.Ed. 1715, 337 U.S. 901, 69 S. Ct. 1046). If the intent of the state legislatures is to be controlling, then certainly the question of whether the Fourteenth Amendment affects state anti-miscegenation laws must be decided against the appellants, because those states which ratified the Fourteenth Amendment clearly stated their intent by the continuation of their state anti-miscegenation laws, contemporaneous with their ratification of the Fourteenth Amendment.

A comparison of the list of states having anti-miscegenation laws, as set out in the appendix to the appellants' brief with the list of states relied on for rati-

fication of the Fourteenth Amendment as set out in U.S.C.A., **Fourteenth Amendment**, reveals that 21 of the 30 states relied on for ratification continued their anti-miscegenation laws and policies after the passage of the Fourteenth Amendment.

The federal courts, within twenty years after the passage of the Fourteenth Amendment, upheld an Alabama statute as valid against a Fourteenth Amendment attack, even though such statute prohibited ninterracial cohabitation and interracial marriage. (see **Pace vs. Alabama**, 106 U.S. 583). In the case of **Ex parte Edmund Kinney**, 14 Fed. Cases 602, 3 Hughes 1, the federal circuit court rendered an opinion within thirty years of the passage of the Fourteenth Amendment that such did not affect state anti-miscegenation statutes. In the case of **Ex rel William B. Hobbs and Martha A. Johnson**, 1 Woods 537, the federal circuit court, in considering a habeas corpus petition submitted by those arrested for violation of state anti-miscegenation laws, found that the Fourteenth amendment, passed four years earlier, did not affect state anti-miscegenation provisions. The rationale of the federal holdings in **Kinney**, **Hobbs**, and **Pace**, *supra*, is clearly set out in **State vs. Tutty**, 41 Fed. 753 (1890), wherein it was stated that anti-miscegenation laws were nondiscriminatory because each, or both, races were prohibited from marrying the other, and thus neither was favored.

There have been, of course, numerous state decisions, all of which with the exception of **Perez vs. Sharp**, 32 Cal.2d 711, 198 P.2d 17, have upheld the

anti-miscegenation laws therein being considered. Those which are contemporaneous with the passage of the Fourteenth Amendment are: **Scott vs. Georgia**, 39 Ga. 323 (1869), and **State vs. Gibson**, 36 Ind. 389, 10 American Reports 42 (1871).

We thus see from the above that contemporaneous with the passage of the Fourteenth Amendment, the federal legislative body, the state legislative bodies, the federal judiciary, and the state judiciary each have indicated their belief that the state anti-miscegenation laws were unaffected by the provisions of the Fourteenth Amendment.

A controlling precedent supporting the proposition that the Fourteenth Amendment was not intended to affect the anti-miscegenation laws of the states is furnished by the case of **Name vs. Name**, 87 S.E.2d 749, 197 Va. 80, 350 U.S. 891, 100 L.Ed. 784, 350 U.S. 985, 100 L. Ed. 852. When the **Name** case, *supra*, was first presented to the Supreme Court of Virginia, such court ruled that the state statute which prohibited interracial marriage did not violate either the federal or state constitutions (87 S.E.2d 749, 197 Va. 80). When such issue was presented through the vehicle of the case to the United States Supreme Court, that Court remanded the case to the State court so that such state court would indicate the true relationships of the parties involved in the case to the State of Virginia (350 U.S. 891, 100 L.Ed. 784). The Virginia court then set out in detail that the parties were so related to the state at the time of formulating the marriage so as to give the Virginia court jurisdiction to question

the validity of such marriage under Virginia law (197 Va. 734, 90 S.E. 2d 849). The basis for questioning the validity of the marriage was that Virginia law prohibited interracial marriage. The Supreme Court of the United States then held, following the determination by the Virginia court, that no federal question was involved in the case (350 U.S. 985, 100 L.Ed. 852). Thus the Supreme Court of the United States held that no federal question was involved in the state statute which prohibited interracial marriage. An analysis of the case reveals that the United States Supreme Court held that the only constitutional question involved was the question of whether the Virginia law was applicable to the formation of the marriage. It is probable that the United States Supreme Court determined that the relationship of marriage is one which is provided for by the state, and that such relationship is not secured by any constitutional guarantee of the federal constitution.

The appellants' assertion that marriage itself is such a fundamental right that it must be considered guaranteed by the Fourteenth Amendment is so diluted as to be in a state of no substance whatsoever by the fact that the Fourteenth Amendment was not considered as guaranteeing even so fundamental a right as racial suffrage. In addition to the reason previously given that anti-miscegenations Statues are non-discriminatory in that both races are prohibited, the prohibition against interracial marriage can well be supported by the proposition that such prohibition has indicated that races better advance in human

progress when they cultivate their own distinctive characteristics and develop their own peculiarities.

Appellants attempt to rebut such proposition on pages 20 through 23 of their brief by submitting Unesco statements and other materials which support the conflicting proposition that race is a myth rather than a scientific fact. **The Race Concept**—(published by the United Nations, Copyright 1952, Unesco, Paris), a later Unesco publication, provides extensive scientific opinion supporting the proposition that the scientific attributes of race are such as to provide a proper legislative purpose in the prohibition of interracial marriage.

A further basis for finding a proper legislative purpose in enacting anti-miscegenation legislation is the prevention of interracial conflicts which may well result from interracial marriages occurring in communities where such marriages create strong adversity in both the white and the negro race. It is well known that both the white and the negro race tend to shun the off-spring of interracial marriages. Such marriages therefore have the ability of causing such tension as to be conducive to racial conflict; each race resents the invasion. It is further apparent that proper legislative purpose is provided by the need to protect the offspring of marriages. The need of off-spring to identify with others is a well understood psychological factor in present times. The interracial offspring are not fully accepted by either race. There is therefore a clear psychological handicap problem among interracial offspring. Since the decision in **Brown vs. Topeka Board of Education**, 347 U.S. 483,

psychological handicaps have been considered of a scientific nature, and clearly the prevention of such undesirable scientific occurrences forms a proper legislative purpose. The appellants' brief gives great emphasis to the proposition that there can be no proper legislative purpose because the races are inherently equal. However, many who consider their racial opposites to be of equal social standing decline to marry such because their interracial offspring will not have the same psychological or social standing that such offspring would have if they were descendants of sexual partners of the same race.

In the case of **Purity Extract and Tonic Company vs. Lynch**, 226 U.S. 192, Justice Hughes set out with clarity that the court has no concern with the wisdom of exercising a particular legislative power; and unless the particular enactment has no substantial relationship to a proper purpose, the court should not declare that the limit of legislative power has been transcended. Justice Hughes goes on to say that the court should not determine whether the use of legislative powers is used wisely as such would be contrary to our constitutional system, and would substitute a judicial opinion for the legislative will. It is therefore submitted that this court should decide adverse to appellants the question of whether the federal constitution prohibits state anti-miscegenation provisions, unless it is conclusively determined that there is no proper legislative purpose to support the enactment of an anti-miscegenation law. Doubt as to whether there is any proper scientific basis or other reason which would provide an adequate legislative purpose goes to the

wisdom of the act. Only if this court determines that there is no reasonable legislative basis for enacting such laws, should such laws be overthrown as unconstitutional under the standards expressed in the Fourteenth Amendment to the Federal constitution.

The rule applicable between the higher courts and the legislative bodies is comparable to that applicable in determining the relationship of power between the higher courts and the jury. If there is any substantive evidence to support the finding of the jury, the finding must be upheld by the higher court; if there is any substantive evidence to support the existence of a valid legislative purpose, then the court should not invalidate the legislative act passed pursuant to such legislative purpose.

In the case of the **United States vs. Bhagat Singh Thind**, 261 U.S. 204, 126 F.2d. 1021, the United States Supreme Court justified the exclusion of the high class of Hindus under the immigration laws as they existed at the time the case arose on the basis that a great body of the people of this country instinctively recognized and rejected the thought of assimilation with Hindus because of the racial differences of the Hindu. The court went on to say that the children of English, French, German, Italian, Scandinavian and other European parentages quickly merge into the mass of our population and lose the distinctive hallmark of their European origin. The court then indicated that it cannot be doubted that children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry. It is submit-

ted that the rationale of such holding and the apparent psychological handicaps of children born of negro-white parentage provide at least a sufficient probability of the existence of a proper legislative purpose as to support a holding that the present anti-miscegenation laws of the State of Florida are supported by proper legislative purpose so as not to be subject to the indictment that they are unconstitutional because of being arbitrarily discriminatory in violation of the prohibitions of the Fourteenth Amendment. Such conclusion was reached as late as 1944 in the case of *Stevens vs. U.S.*, 146 F.2d. 120, wherein a state law prohibiting negro-white marriages was held not to violate the Fourteenth Amendment to the United States constitution.

All applicable medical treatises support the proposition that sickle-cell anemia is found almost exclusively among the negro population. Certainly if a drug was found which prevented common colds but which caused sickle-cell anemia among negroes, this Court would uphold state legislation which permitted doctors to inject such drug into white persons, but which prohibited doctors from injecting such drug into negroes. Such hypothetical statute may have forgotten to be racially colorblind, but nevertheless the proper legislative purpose causes the racial discrimination to be secondary and to have no constitutional effect.

The appellee submits that there is sufficient proper legislative purpose in enacting anti-miscegenation laws to cause the racial aspects of such laws to be secondary and to have no constitutional significance.

QUESTION II

WHETHER THE QUESTION OF THE CONSTITUTIONAL VALIDITY OF STATE ANTI-MISCEGENATION LAWS IS PRESENT IN THE INSTANT CASE.

The only evidence which even intimates the existence of a marriage between the appellants is provided by the testimony of Mrs. Dora Goodnick and Dorothy Kaabe. Mrs. Goodnick testified that in February of 1961 Connie Hoffman stated that she was married to the white man Hoffman, who was accompanying her at such time (R 22). She further testified that in October of such year the defendant Hoffman said she was married to the defendant McLaughlin (R 23).

Dorothy M. Kaabe's testimony lacks clarity. She stated that the defendant Hoffman told her that she lived with a Mr. Gonzalez in 1956, but that she could not marry him because she had never had a legal divorce; that she lived with Mr. Hoffman as late as October 1959; that she then lived with Mr. McLaughlin as his common law wife and that she had no legal marriage to him (R 83, 84.)

Neither Mrs. Goodnick nor Mrs. Kaabe ever testified that the defendants were married, and there is no other evidence in this case to establish such fact. They testified only that she told them she was married. There was ample evidence indicating that the defendants were NOT married; however, such evidence is of no legal materiality in considering the question of

whether the defendants were entitled to have the question weighed by the jury. If the defendants were so entitled, then the jury instruction by the trial court that common-law marriage could not be formulated between the defendants in this state would probably be an adequate foundation for the question of the validity of the Florida anti-miscegenation laws; the state, however, is not required to prove the absence of a marriage between the defendants because the state is not required to prove the negative where the positive may be easily proven by the defendants, and such negative is almost impossible to be proven. This rule was recognized by this court in the case of **Rossi vs. United States**, 289 U.S. 89, 77 L.Ed. 1051, when Rossi was prosecuted for possession and control of an unregistered still, this court ruled that the prosecution did not have to prove that the still was unregistered.

Another decision directly controlling is provided by the case of **U.S. vs. Pape**, 144 F.2d 778. Pape was prosecuted for transporting a woman in interstate commerce for immoral purposes. Under the circumstances of the case, an existing marriage between the defendants would have been a complete defense, since Pape's purpose was to pay the woman to engage in sexual relations with him. The federal circuit court of the second judicial circuit ruled that the prosecution did not have to undertake the impossible burden of proving that the defendants had no existing marriage. The logic of such decision and its applicability to the instant case are readily discerned if we consider that in order to prove the non-existence of even a formal marriage the prosecution may conceivably be required

to prove that the defendants have at no time married in any place (including foreign countries). Such requirement would render impossible successful prosecution while the counter requirement that the defense make some proof of the positive causes no hardship on the defendants. The prosecution may have even greater difficulty in proving the non-existence of a common law marriage as compared with proving the non-existence of a formal marriage. The greater difficulty is caused by the distinguishing feature that common-law marriages are not recorded, and therefore the prosecution would have to negate the effect of the acts and intents of the accused at all places and all times. These considerations have led to extensive judicial support of the state's position that the non-existence of marriage does not have to be proven. (In addition to the *Rossi* and *Pape* cases, *supra*, note *State vs. McDuffie*, 107 N.C. 885, 12 S.E. 83; *State vs. Naylor*, 68 Okla. 139, 136 P. 889; *People vs. Cotton*, 2 Utah, 457; *Grace vs. State*, 55 So. 2d 495, 212 Miss. 784; 53 C.J.S., *Lewdness*, Section 5).

The appellants urge that the law of Florida requires the prosecution to prove absence of marriage regardless of the feasibility of so doing. They urge the case of *Orr vs. State*, 129 Fla. 398, 176 So. 510, as support of such allegation. Appellants urge other cases in support of the general proposition that the state must prove each and every essential element of the offense but such are only applicable if non-marriage is an essential element required to be so proven. The appellee will demonstrate that the law of Florida supports the rationale that the prosecution does not have

to undertake the impossible task of negating the existence of a marriage between the defendants under the circumstances which are herein present, i.e., that the defendants could readily prove the positive of the question of marriage if such was a fact.

First to dispense with the appellants' use of *Orr vs. State*, supra; the appellants apparently rely on the following language:

"(1) It is the contention of counsel for plaintiff in error that the State of Florida failed and otherwise omitted to prove and establish that the plaintiff in error was not the wife of Nathaniel Thompson. The information, supra, charges and the burden of proof rests upon the State of Florida to show that the relation of husband and wife did not exist between plaintiff in error and Nathaniel Thompson. This question is squarely raised by counsel for plaintiff in error and is the pivotal point in this suit. The plaintiff in error is a colored woman and asserts she was, . . ." (176 So., text 511).

It is probable that that part of the above quote relied on by the appellants is only part of the question submitted by the appellants *Orr*, rather than the opinion of the author of such opinion. Such is clearly indicated by the fact that the opinion proceeds to rely on the fact that the defendant submitted evidence clearly sufficient to establish the existence of a marriage and there was no legally sufficient counter evidence submitted by the state. The court concluded that the

verdict was contrary to the evidence, and stated that the facts of the case should be submitted to a new jury. Furthermore, even if the written opinion favored the proposition that the state had to prove the absence of a marriage, such would not be precedent because a majority did not concur in such decision. The Florida Supreme Court has conflict certiorari jurisdiction in cases of conflict arising out of the district courts of appeal of this state (Article V, Section 4, of the Florida constitution). Conflict jurisdiction is founded on conflict in precedent, and is not based on concern of the rights of the individual parties (See **Ansın vs. Thurston**, 101 So. 2d 808). When a specific opinion is not directly concurred in by a majority of the court, such opinion does not form a basis for conflict because of the absence of precedent. This proposition is conclusively supported by the Supreme Court of this state in remanding the decision rendered by the district court of appeal in the case of **Solomon vs. Sanitarrians' Registration Board**, 147 So. 2d 132 because a majority of the judges failed to directly concur in any written opinion, though concurring in the affirmance. Only three out of six judges concurred in the **Orr** opinion, *supra*.

The **Orr** decision was rendered prior to the enactment of Florida's Criminal Code (Chapter 19554, Acts of 1939). In the case of **Gurr vs. State**, 7 So. 2d 590, the Florida Supreme Court noted the decisions rendered prior to the enactment of the Code dealing with the question of what elements needed to be alleged in an indictment, and indicated that the requirements

were less stringent after the enactment of the criminal code, and that decisions rendered prior thereto were not necessarily controlling. Insomuch as that which need not be alleged in the charge generally need not be proved, the Gurr decision is applicable to the question of what elements must be proved by the state. The court held that Gurr was adequately charged with an offense of practicing dentistry without a license, even though the state did not aver that he was not exempted from the licensing requirement.

In **Ferrell vs. State**, 34 So. 220, 45 Fla. 26, the court held that during a bigamy prosecution the state did not have to allege the absence of the defensive circumstance of the prior spouse's being absent for three continuous years. In **Butler vs. Perry**, 67 Fla. 405, 66 So. 150, the defendant was charged for violating a statute, the body of which required every able-bodied man to work on the public roads. Later clauses of this act set out what constituted a disabled person. The indictment, which did not allege that the defendant was able-bodied was upheld by the Florida Supreme Court.

The Florida Supreme Court recognized the difficulty of proving the negative in the case of **J. J. Carter Furniture Company vs. Banks**, 11 So. 2d 776. The court held in such case that the party alleging the invalidity of a second marriage on the basis of the continuation of a previously existing marriage must prove the lack of termination of the first marriage. Such holding, however, is only applicable where there

is substantive evidence of the existence of the second marriage. Such evidence is lacking in the instant case.

The appellee, as an officer of the court, wishes to acknowledge that the Florida cases of **Butler**, **Gurr**, and **Ferrell**, *supra*, which support the proposition that the prosecution does not have to negate the existence of defensive exceptions, do not directly support the proposition that the state does not have to negate the existence of a marriage. However, such cases are of indirect support by demonstrating that Florida is not adverse to placing a burden of proof on the defendant when judicial precedent merits such action. The out-of-state precedent supporting the proposition that the prosecution does not have to undertake the often impossible ask of negating the existence of a marriage has been provided by the appellee. Appellants have been unable to provide any case wherein a conviction was overthrown on the basis of a valid defense of marriage even though there was no evidence of its existence. The **Orr** case, relied on by appellants, is of no value as precedent, as the evidence conclusively supported the existence of a marriage, and there was no majority decision.

It is submitted that a fair determination would conclude that the out of state authority submitted clearly supports appellee's position. The Florida authority is of a non-conclusive and vague nature. Insomuch as the appellants are carrying the burden, it is submitted that this issue must be decided against them. Appellee therefore concludes that the appellants had the burden of proving that peculiarity within their knowl-

edge, the existence of a common law marriage. The appellee was entitled to an instruction to such effect. The appellee was entitled to a further instruction that as a matter of law there was a total lack of evidence (even when all testimony favoring the defense was assumed to be true) supporting the existence of a marriage. Thus, the appellants were not entitled to the defense of marriage and it is of no consequence that the court gave the wrong grounds for the destruction

In its decision rendered in *Durley vs. Mayo*, 351 U.S. 277, 100 L.Ed. 1178, 76 S. Ct. 806, the United States Supreme Court indicated that where there was adequate state ground to support a state decision, such decision could not be utilized as a vehicle to review constitutional questions in the United States Supreme Court even though in the absence of such adequate state ground such questions might have been presented and subject to proper review. Section 924.33, Florida Statutes, directs the appellate courts of this state not to reverse a criminal conviction unless errors committed by a trial court are of a harmful nature. Such section further provides that error shall not be presumed. An instruction which had the result of denying the defendants the defense of marriage, because of the provisions of the state anti-miscegenation laws, could not constitute harmful error when the defendants, because of other reasons, were not entitled to the defense of marriage.

Section 918.10, Florida Statutes, provides another adequate state ground for the Supreme Court's failure to reverse the case because of the jury instruction con-

cerning the anti-miscegenation laws of this state. Section 918.10, Florida Statutes, provides that no party may assign as error or grounds of appeal the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict. The present record before the court is devoid of any evidence that an objection was made to the instruction that the defendants could not validly contract a common-law marriage in this state. Because of the failure to object, the issue involving the correctness of the instruction was never presented to the trial court, and therefore the appellate court was not provided with grounds for reversal even if the instruction was incorrect because the trial court could not err on issues not presented or considered.

QUESTION III

WHETHER THE DEFENDANTS, BY BEING PROSECUTED UNDER A STATUTE WHICH PROHIBITS INTERRACIAL COHABITATION, WERE DENIED EQUAL PROTECTION AND DUE PROCESS OF LAW, AS SUCH TERMS ARE ENCOMPASSED BY THE PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

This argument is responsive to that argument given in appellants' brief under question one. This question is clearly concluded against the appellants by the case of *Pace vs. Alabama*, 106 U.S. 583, 27 L.Ed. 250, 1 S.Ct. 489. The *Pace* decision was rendered within fifteen

years of the passage of the Fourteenth Amendment. The decision adopts the same rationale urged by the federal legislature when adopting the Fourteenth Amendment as demonstrated in question one of this brief. The rationale is equally applicable to prohibitions against interracial marriage and to prohibitions against interracial illicit intercourse. The court held that insomuch as the section of the Alabama code which prohibited interracial fornication applied the same punishment to both white and black offenders, there was no discrimination as to either. The court simply adopted the rationale urged by members of Congress when Congress was considering the effects of congressional acts which prohibited racial discrimination. The court is referred to the appellee's argument under question one wherein appropriate citations are given in support of the proposition that members of the national congress felt that prohibitions against interracial discrimination did not affect anti-miscegenation statutes because such statutes were equally applicable to members of each race. It should be noted that the rationale of *Pace* does not conflict with the doctrine that separate facilities are inherently unequal. There is no separate facility involved in a prohibition against interracial illicit cohabitation. The sole facility denied to each race is the state's sanction of interracial marriage. It is clear that if the question presented under point one is answered in favor of the state, and if it is concluded that the Fourteenth Amendment does not prohibit the enactment of anti-miscegenation statutes, it must follow that such amendment does not prohibit the enactment

of statutes prohibiting interracial cohabitation. The power to pass an anti-miscegenation statute is but a power to refuse to sanction the cohabitation acts of the parties. Inherent in the right to refuse to sanction such acts must be the right to punish such acts. Therefore clearly, if the state may prohibit interracial marriage, it may as a corollary thereto prohibit interracial cohabitation. Section 798.05, Florida Statutes, under which the defendants were charged, simply prohibits **habitual** cohabiting of the same room by members of opposite races who are also members of opposite sexes. The terms of Section 798.05, *supra*, explicitly seek to avoid circumstances wherein there are high potentials of sexual engagement. General intermingling of the races is not prohibited where such potential does not exist. Section 798.02, Florida Statutes, which prohibits intraracial lewd cohabitation, has generally been interpreted as requiring the additional element of sexual occurrence as distinguished from the provisions of Section 798.05, *supra*, which only require a high potential of such occurrence. The legislative purpose in enacting both Sections 798.02 and 798.05, *supra*, is to prevent illegal sexual occurrences.

Since Chapter 798, Florida Statutes, clearly undertakes to prohibit both interracial and intraracial illicit sexual activities, it is submitted that the single factor that Section 798.05, *supra*, does not specifically require proof of an actual act of intercourse is not so great as to become an unwarranted unconstitutional legislative discrimination between those in appellants' class and those in the position of undertaking intraracial

sexual activity. It is pointed out in **McGowan vs. Maryland**, 366 U.S. 420, 6 L.Ed. 2d 393, 81 S.Ct. 1101, that state legislatures are presumed to have acted within their constitutional powers in spite of the fact that in practice their laws result in some inequality.

Going outside the statutes and into the facts of the case, we find additional evidence that the appellants herein were not placed in unfavored positions. Such appellants were convicted in an area wherein the citizens are metropolitan, sophisticated, and possess a diversified cultural background. The characteristics of such area are generally conducive to racial tolerance and the sentences of appellants reflect such facts; such sentences being a nominal thirty day jail term, and a fine of \$150.00. Such resulted because of a violation of basic concepts in sexual decency and not because of any heated passionate reaction based on racial intolerance. The purpose of the legislature in enacting both Sections 798.02 and 798.05, Florida Statutes, was to prevent such breaches of basic concepts of sexual decency whether committed by interracial or intraracial parties.

QUESTION IV

WHETHER THE WORD "NEGRO" AS USED IN SECTION 798.05, FLORIDA STATUTES, RENDERS SUCH SECTION SO AMBIGUOUS AS TO LEAVE APPELLANTS UNNOTIFIED THAT THEIR ACTION WAS PROHIBITED.

The rule prevailing in the jurisdiction of the state of Florida is that errors assigned but not argued are treated as abandoned (*Crawford vs. State*, 86 Fla. 94, 97 So. 288; *Hysler vs. State*, 85 Fla. 153, 95 So. 573; *Burnette vs. Green*, 97 Fla. 1007, 122 So. 570, 69 A.L.R. 244; *Thomas vs. State*, 36 Fla. 109, 18 So. 331; *Tracy vs. State*, 130 So. 2d 605).

Contained in the appendix submitted herewith is a copy of the appellants' brief submitted to the Supreme Court of the State of Florida. It is apparent from a reading of such brief that appellants failed to present or argue the question now being set out above as appellee's question. four. It is therefore clear, under the above citations, that such question was not properly before the Florida Supreme Court. There was adequate state ground for ruling against the appellants on such question, to wit: such question had been abandoned by their failure to argue such in their brief. It is further pertinent that the petition for rehearing filed by the appellants does not urge the present issue (see R 103).

The gist of appellants' complaint appears to be that Section 798.05, Florida Statutes, when read in conjunction with Section 1.01, Florida Statutes, is too exact in setting out an exact percentage definition of the term "Negro". The mathematical exactness negates the existence of ambiguity. It does not establish it. The controlling question is whether the defendants were possibly led into believing that their act was not prohibited by Section 798.05. It is clear that a thorough consideration of such question leads to but one con-

clusion, to wit: the appellants well understood that their act of continued cohabitation between one who was negro and one who was white was clearly prohibited by the terms of the statute. The evidence adequately reveals that appellants considered themselves to be white and negroid.

In construing statutes, the ordinary meaning of language must be presumed (*Levy's Lessee vs. McCartee*, 31 U.S. 102, 6 Peters 102; *United States vs. Coombs*, 37 U.S. 72). The popular or received import of words furnishes the general rule for interpretation of public laws (*Maillard vs. Lawrence*, 57 U.S. 251). In *Morrison vs. People of the State of California*, 291 U.S. 82, Mr. Justice Cardozo, speaking for the United States Supreme Court, said that white persons within the meaning of the statute therein involved were members of the Caucasian race as Caucasian is defined in the understanding of the mass of men (see also *Wadia vs. United States*, 101 F.2d 7). The *Morrison* case recognizes the term "blood"; it is clear that such term refers to lineal descent rather than any direct biological substance. Thus, the term "blood" as used in Section 1.01, Florida Statutes, is not ambiguous. Such term was used by federal district judge Cushman of Washington in his opinion *In Re Young*, 198 F. 717. Justice Learned Hand himself noted in *In Re Lampitoe*, 232 F. 382, the significance of the term "blood" when given racial application. Justice Story in 1820 upheld a statute against a constitutional attack for vagueness under circumstances where such statute utilized the term "persons of color" (see *United States vs. La Coste*, 26 F. Cases 826).

In **Mercer vs. Reynolds**, 317 Mich. 632, 27 N.W. 2d 40, the term "negro" was held to have a definite meaning as within the general understanding of those who spoke the English language. (See also **Ridgeway vs. Cockburn**, 296 N.Y. Supp. 936.) In the case of **United States vs. Perryman**, 100 U.S. 235, the Supreme Court of the United States distinctly recognized that there was a well understood difference between the terms "negro person" and "white person" in spite of the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States constitution.

In light of the above authorities, it would appear that statutes which fail to set out with mathematical exactness the percentage of negro lineage necessary to constitute a negro have been held to be valid when attacked for vagueness. It must follow that where a statute specifically specifies its definitions as is the case in Florida (see Section 1.01, Florida Statutes) that such statute should not be invalidated on the grounds that it is too vague to meet constitutional standards. In the case of **Roth vs. United States**, 354 U.S. 476, 1 L.Ed. 2d 1498, 77 S. Ct. 1304, the United States Supreme Court upheld a conviction for having knowingly deposited obscene literature for mailing. The term "obscene" was certainly not subject to any mathematical definition. The court nevertheless held that such term had such a general and well understood meaning that it did not possess the constitutional infirmity of vagueness. The **Roth** decision sets a standard of clarity clearly met by Section 798.05, and Section 1.01 Florida Statutes, which define "Negro" with mathematical exactness.

QUESTION V

WHETHER THE PROVISIONS OF THE ALLEGED FOURTEENTH AMENDMENT OF THE FEDERAL CONSTITUTION WERE VALIDATED AS REQUIRED BY ARTICLE V OF THE UNITED STATES CONSTITUTION.

Appellants' basis of attack against miscegenation and the alleged discriminatory characteristics of Section 798.05, Florida Statutes, must be supported by the provisions of the Fourteenth Amendment if such attack is to be successful. Article V of the federal constitution provides:

"The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a convention for proposing amendments, which in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several States, or by convention in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

Article I, Section 3 provided that each state be entitled to two senators. It is therefore clear that as a matter of law, the Senate at the time the Fourteenth Amendment was proposed consisted of 72 seats. The Fourteenth Amendment, as is recorded by **Congressional Globe**, 39th Congress, First Session 4032, was proposed by only thirty-three members of the Senate. Article V requires that $\frac{2}{3}$ of both houses must propose amendments. It is clear that the proposal was made by a number less than the 48 which would have been required if the $\frac{2}{3}$ provisions of Article V were honored. The amendment, having been unconstitutionally proposed, can not be constitutionally adopted.

The state will readily acknowledge that the position herein taken has previously been rejected by the United States Supreme Court. However, such factor was facing those who undertook the appeals in the cases of **Gideon vs. Wainwright**, 372 U.S. 335, 9 L.Ed. 2d 799, 82 S.Ct. 792, and **Brown vs. Topeka Board of Education**, 347 U.S. 483.

The position herein urged by the state, if adopted, will insure continued constitutional stability of the present government. If the position of the appellants is adopted, then we have clear precedent for the proposition that 51% of the members of each of the federal legislative bodies can, by resolution or bill, expel the other 49%, and then propose by $\frac{2}{3}$ vote of the remaining members a constitutional amendment transferring federal judicial power from the United States Supreme Court to the various and sundry state courts. It is quite probable that the self-interest of the states would

be of such a magnitude as to insure a quick ratification of such amendment, once proposed. It is submitted that a proposition supporting such occurrence clearly is unsound. The rejection of such proposition requires a rejection of the Fourteenth Amendment.

CONCLUSION

WHEREFORE, because of the foregoing reasons, it is respectfully urged that the appellants have not sustained their burden of demonstrating clear constitutional grounds for reversal.

Respectfully submitted,

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PROOF OF SERVICE

I HEREBY CERTIFY that a copy of the above Brief of Appellee has been furnished by mail this day of September, 1964, to the following as members of counsel for Appellants:

Honorable Jack Greenberg; Honorable James M. Nabrit, III; Honorable Leroy D. Clark; Honorable Robert Ramer; Honorable H. L. Braynon; Honorable G. E. Graves, Jr.; Honorable Louis H. Pollak, and Honorable William T. Coleman, Jr.

Of Counsel for Appellee

IN THE
Supreme Court of
Florida

CONNINE HOFFMAN also known as CONNIE
GONZALEZ and DEWEY McLAUGHLIN,

Defendants-Appellants,

vs.

THE STATE OF FLORIDA

Plaintiff-Appellee.

BRIEF OF DEFENDANTS-APPELLANTS

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APPENDIX "A"**STATEMENT OF THE CASE**

Defendants were arrested in February, 1962 and charged with having violated Section 798.05 of the Florida statutes in that "the said Dewey McLaughlin, being a Negro man, and the said Connie Hoffman, also known as Connie Gonzalez, being a white woman, who were not married to each other, did habitually live in and occupy in the nighttime the same room." (R2, 94) Defendant Connie Hoffman began residing in a one room apartment at 732 Second Street, Miami Beach, Florida in April, 1961. (R29) The owner of the premises, Mrs. Dora Goodnick, testified that she saw the defendant McLaughlin at various times in December, 1961 and February, 1962 come into the apartment house at night and leave in the morning. (R32-34) Mrs. Goodnick also claimed to have seen defendant McLaughlin showering in the bathroom and heard him talking to defendant Hoffman in her apartment at night. (R42-44) Defendant Hoffman told Mrs. Goodnick that defendant McLaughlin was her husband. (R30) Mrs. Goodnick stated that she was disturbed that a colored man was living in her house and consequently reported the situation to the police. (R31)

Detective Stanley Marcus and Detective Nicolas Valeriana of the Miami Beach Police Department went to defendant Hoffman's apartment at 7:15 P.M. on February 23, 1962 to investigate a charge that the defendant was contributing to the delinquency of her minor son. (R 52-54). They knocked at the apartment

door and a man's voice answered, "Connie, come in," but the apartment door was not opened. (R53-54) Detective Valeriana went around to the back of the apartment and found defendant McLaughlin exiting from the rear door. (R62) In the questioning which followed, defendant Hoffman admitted that he had been living on the premises with defendant Hoffman, (R65) and that on at least one occasion he had had sexual relations with her. (R72) The detectives also observed pieces of defendant McLaughlin's wearing apparel draped across the furniture in the room. (R69) Defendant Hoffman came to the police station where defendant McLaughlin was being held and while there stated that she was living with a Negro but thought that this was not unlawful. (R74) Detective Valeriana identified defendant Connie Hoffman as a white woman and defendant McLaughlin as a Negro from their appearances. (R92-93, 95)

Josephine De Cesare, a secretary in the City Manager's Office, testified that in the process of securing a civilian registration card, the defendant McLaughlin stated that he "was separated and that his wife's name was Willie McLaughlin." (R119) Dorothy Kaabe, a child welfare worker in the Florida State Department of Public Welfare testified that in an interview on March 5, 1962, defendant Hoffman stated that she began living with the defendant McLaughlin as her common law husband since October 1961 but had never had a formal marriage to him. (R135)

Prior to trial defendants moved to quash information alleging that it was vague, indefinite, and de-

signed to prevent a fair trial. It was further alleged that the statute under which the information was drawn was null and void under the Constitution of the United States in that it was vague, denied due process and equal protection of the laws, and was an invasion of defendants right of privacy. (R4-5) The motion to quash the information was denied. During the trial defendants made an oral request for a directed verdict on the grounds that the state had failed to make adequate proof that defendant McLaughlin was a Negro under Section 1.01 of the Florida statutes which sets forth the criteria for identifying a "Negro" whenever that term is used in a statute. The motion for directed verdict was denied. (R97-100) Upon submitting the case to the jury the judge gave instructions that the defendants could not have lawfully married in the State of Florida because they were of opposite races. (R135) Defendants were found guilty and each received a sentence of 30 days in the county jail and a fine of \$150.00 and in default thereof an additional 30 days at hard labor. (R158-159)

On July 3, 1962, defendants filed a motion for new trial in which it was alleged that the verdict was contrary to law and the weight of evidence, that the court erred, (1) in overruling defendants motion to quash the informaion and the motion for leave to be tried in absentia and (2) in permitting the testimony of Detective Valeriana based on his observations of the defendants to satisfy the statutory criteria defining a "Negro." (R9-10) The motion for new trial was denied. (R11)

On July 16, 1962, defendants duly filed a notice of appeal to the Supreme Court of Florida. (R11-12) Assignments of Error, filed on August 2, 1962, alleged that the court erred in overruling the motions to quash the information and the motion for leave to be tried

ARGUMENT

Conviction Of Defendants Denies Them Equal Protection Of The Laws Guaranteed By The Fourteenth Amendment To The United States Constitution And Is Before The Court On Assignment Of Errors Number 1 B.

Defendants were convicted under a statute which established a maximum penalty of 12 months in jail and a fine of \$500 for any Negro and white to habitually occupy the same room at night when unmarried. Defendants' claim to denial of equal protection of the laws under the Fourteenth Amendment rests initially on two grounds: Firstly, the law provides a special criminal prohibition on cohabitation solely for persons who are of different races; or, secondly, if this special statute is equated with the general fornication statute, then higher penalties are imposed on the persons whose races differ than would be applicable to persons of the same race who commit the same acts.

The crime under Section 798.01 of the Florida Statutes arises only in connection with the activities of one definite category of persons—interracial couples. There is no statute in Florida which prohibits unmar-

ried persons regardless of race from habitually occupying a room during the night. Negro couples or white couples may participate without penalty in the same behavior (habitually occupying a room at night) which is the basis for a criminal prosecution for couples who differ as to race.

The state, therefore, has made a classification of persons solely in terms of their race and subjected specific behavior by this group of persons and only this group of persons to criminal prosecution. The general criterion for evaluating the compatibility of state legislation with the demands of the equal protection clause of the Fourteenth Amendment, was stated in *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 406:

"In passing upon legislation assailed under the equality clause we have declared that the classification must rest upon a difference which is real . . . so that all actually situated similarly will be treated alike, that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the state and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote, or negligible.

The usual presumption in favor of legislation does not operate where racial distinctions are a factor. *Korematsu v. U.S.* 323 U.S. 214 and *Hirabayashi v. U.S.*

320 U.S. 81. The state must meet the burden of showing that limiting the definition of a crime to interracial activities is in the furtherance of a legitimate state purpose. Racial discrimination which is the aim of the statute under which the defendants were convicted is not a legitimate governmental purpose. **Bolling v. Sharpe**, 347 U.S. 497 and **Shelley v. Kraemer** 334 U.S. 1. Consistently in area after area the Supreme Court has held that race is not a legitimate means of legislative classification by the state. Race has been disapproved as a determining factor in: the right to follow a lawful occupation, **Yick Wo v. Hopkins**; 118 U. S. 356; the right to serve on juries, **Carter v. Texas** 177 U.S. 442; the right to buy, sell or occupy property, **Buchanan v. Warley**, 245 U.S. 601; the right to attend public schools, **Brown v. Board of Education**, 347 U.S. 483; and the right to participate in primary elections, **Nixon v. Herndon** 273 U.S. 536.

The Supreme Court has often held that race is "constitutionally an irrelevance," **Edwards v. California** 314 U.S. 160, 185 and that criminal justice must be administered "without reference to considerations based on race." **Gibson v. Mississippi**, 162 U.S. 565, 591.

In the only cases in which any exception to this rule was had, **Korematsu** and **Hirabayashi**, *supra*, the federal government was permitted to place military restrictions upon persons of Japanese descent during World War II. The action was justified on the grounds that during war time a government may have access to extreme measures which would be impermissible absent an emergency situation. The court in **Hiraba-**

vashi felt constrained to say, "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality" (at page 100), and later in *Korematsu* it was said, "courts must subject them (racial distinctions) to the most rigid scrutiny" (at page 216). It was also noted that the Fifth Amendment, against which this action was tested, contains no equal protection clause. The states, however, are specifically bound to equal protection of the laws under the Fourteenth Amendment, which amendment was primarily designed to protect Negroes from state imposed racial discrimination. *Strauder v. West Virginia*, 100 U.S. 303, 307. There are presently no decisions which stand as supporting authority for racial groupings by the states. Casting a prohibition of criminal activities in terms of the racial composition of the participants therefore has no relationship to the furtherance of any legitimate state purpose.

That the statute in question is designed to deny equal protection of the laws is more obvious here where the race of defendants is the sole basis for an increased penalty imposed on illicit behavior. Section 798.03 of the Florida statute prohibits fornication and on its face would apply to all persons regardless of race. It appears that this general fornication statute is aimed at essentially the same behavior proscribed in Section 798.05 of the Florida statutes under which the defendants were tried. The maximum penalty under Section 798.03 is only three months and a fine of \$20.00 as opposed to a maximum penalty of 12 months

and \$500 under Section 798.05. Defendants therefore could participate in the same behavior as two persons of the same race (habitual fornication in a room at night) and yet receive a sentence nine months longer and a fine greater by \$475.00, the difference in their races being the sole basis of the increased penalties.¹ Although each defendant received only 30 days and a fine of \$150, the greater range in penalty in the statute may act to increase the actual sentence received.

The Supreme Court in *Pace v. Alabama* 106 U.S. 583 upheld a statute similar to that involved in this case which forbade fornication and adultery between Negroes and whites. Although a general fornication statute applicable without regard to race carried lesser penalties, the court there found no denial of equal protection because the statute under which the defendants were convicted carried penalties which were equal for both the white and Negro involved. The *Pace* case, decided some 80 years ago, is squarely in conflict with all presently existing interpretations of the equal protection clause. The issue is not whether each race considered as a group is treated equally, but whether the individual complainant has been denied equal protection of the laws. In *McCabe v. Atchison, Topeka, and Santa Fe Railroad*, 235 U.S. 151, the court found that

It may be claimed that the general fornication statute defines a different crime from the statute prohibiting habitual occupancy of a room and therefore cannot be compared. The State's policy, however, to impose higher penalties on illicit sexual behavior between Negroes and whites is made clear by comparing Section 798.04 of the Florida statutes to the general fornication statute. Section 798.04 forbids fornication between Negroes and whites and imposes maximum penalties of 12 months or a fine not exceeding \$1,000, whereas the general fornication statute forbids the same activity but has no racial classification and imposes the lesser penalty of 3 months or \$30 fine.

4 Negro complainants were denied equal protection of the laws under a statute permitting railroads to refuse accommodations to any particular Negro if there were not a large enough demand for such facilities by Negroes as a group. The court said:

"The essence of a constitutional right is that it is -a personal one . . . It is the individual who is entitled to equal protection of the laws."

The invasion of a personal constitutional right is claimed here by both the Negro and white defendant and cannot be satisfied by reference to the general treatment two racial groups receive in relation to one another. **Shelley v. Kraemer, supra**, is the final rejection of the argument that denial of equal protection of a Negro is justified if a white is similarly denied equal protection:

"It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of equalities." (at page 22.)

In circumstances such as these, the minimum demanded by equal protection of the laws is that "no different degree or higher punishment shall be imposed upon one than is imposed on all for like offense." **Moore v. Missouri**, 159 U.S. 673, 678. Both the Negro and the white defendant are denied equal protection of the laws, as each is subjected to a higher penalty

than they would have been if they had been of the same race.

DEFENDANTS' CONVICTION DENIED THEM DUE PROCESS AND EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT IN THAT A LAWFUL MARRIAGE WAS HELD TO BE UNAVAILABLE AS A DEFENSE TO THE CRIME SOLELY BECAUSE OF DEFENDANT'S RACE AND IS BEFORE THE COURT ON ASSIGNMENT OF ERRORS NO. 1C AND 1D.

In charging the jury the judge stated:

I further instruct you that in the State of Florida it is unlawful for any white female person residing or being in this State to intermarry with any Negro male person and every marriage performed or solemnized in contravention of the above provision shall be utterly null and void.

The charge that the defendant could not as a matter of state law have made a valid marriage in Florida is well supported by various miscegenation statutes and the Florida Constitution. Section 741.11 of Florida Statutes and Article 16, Section 24 of the Florida Constitution makes it unlawful for any Negro and white to intermarry and voids all such marriages, making the offspring bastards who are disabled from inheriting. Section 741.12 sets a maximum penalty of 10 years and a fine of \$1,000 for both parties to such an unlawful marriage. Sections 741.13, 741.14, 741.15, 741.16 prohibit the issuing of a marriage license and the performing of the marriage ceremony for any Negro and

white, setting penalties ranging from \$1,000 fine to two years in prison. The statute under which defendants were prosecuted makes their lawful marriage to each other an absolute defense to the charge. The State of Florida gives full recognition to the common law marriage, and there was some evidence (contradicted by other testimony) of a common law marriage between the defendants. (R. 30-31, 135) The judge's charge, however, based on existing state law, removed from the jury any consideration of evidence tending to establish the defense of marriage in the State of Florida since the defendants were a Negro and a white.

The issue, then, is, does the state deny equal protection of the laws by depriving defendants of a defense to a criminal charge solely because of their race? Put in other terms, the question is whether the state may constitutionally prohibit marriage between persons of different races.

The Supreme Court of the United States has had two opportunities to rule on this latter question. The court, however, has not as yet accepted any case and rendered a decision. *Jackson v. The State of Alabama*, cert. den., 348 U.S. 88 (1954) and *Naim v. Naim*, 197 Va. 80, 87, S. E. 2d 749 (1955), judgment vacated 350 U.S. 891 (1955), judgment reinstated 197 Va. 734, 90 S.E. 2d 849 (1956), appeal dismissed 350 U.S. 985 (1956). In the later case, the Supreme Court granted certiorari but then decided that the record was not complete as to the domicile of the parties and remanded it to the Virginia Supreme Court to be returned to the trial court so that evidence could be

taken. That court held the record clearly showed that the plaintiff was a resident of Virginia; the defendant a non-resident and that both parties had been married in North Carolina for the purpose of circumventing the Virginia miscegenation statute. Upon application to the Supreme Court to recall the remand, the court held that the second judgment of the Virginia court left the case devoid of a properly presented federal question and denied the application.

There is, therefore, no authority from the Supreme Court of the United States that a state may constitutionally prohibit an interracial marriage. (The *Pace* case concerned solely a prohibition on fornication and adultery which cannot be conclusive on the constitutionality of the prohibition of marriage, an otherwise lawful and approved relationship.)

The state has traditionally exercised some residual control over the marital institution. *Maynard v. Hill*, 125 U.S. 190, *Reynolds v. U.S.*, 98 U.S. 145. However, the right to marry has been held to be a right guaranteed under the due process clause of the Fourteenth Amendment and thereby protected from arbitrary deprivation by the states. In *Meyer v. Nebraska*, 262 U. S. 390, 399, the court said:

"While this court has not attempted to define with exactness the liberty thus guaranteed (by the Fourteenth Amendment), the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to . . . marry, establish a home and bring up children . . ."

Therefore state legislation must meet the demands of due process of law when nullifying or controlling this kind of liberty or freedom of association. Further, as with all state laws, the equal protection clause demands that no party be deprived of a right which is available to others similarly situated. **Sipuel v. Oklahoma State Regents**, 339 U.S. 637; **Sweatt v. Painter**, 339 U.S. 629. The essence of the right to marry is a freedom to join in marriage with the person of one's own choice. The state, substantially impairs that right by limiting valid marriages to persons of the same race. The curtailment of the right to marry has not been exercised in accord with the dictates of the due process and equal protection clauses of the Fourteenth Amendment for the sole aim and purpose of such legislation is the imputation of inferiority to the members of the Negro race. The legislation is designed to maintain the supposed "purity" of the superior white race and to prevent intermingling with Negroes who are deemed to be inherently defective persons. State laws which are aimed solely at relegating one group to an inferior status by enforced segregation solely because of their race are void as a denial of equal protection of the laws, **Brown v. Board of Education**, 347 U.S. 483, and a denial of due process of law. **Bolling v. Sharpe**, 347 U.S. 497.

An incident of the right to marry is the right of privacy, for the choice of one's marital partner affects one of the most intimate and private relationships that an individual can enter. Further, under this statute, not only is a private relationship subjected to criminal prohibitions but a private place—the home—is sub-

jected to governmental invasion. The commission of the crime, as was the case here, will more likely than not be alleged to have occurred in the living quarters of the defendants. These premises therefore become subjected to the governmental controls, of search, surveillance, and arrest, which are appropriate where criminal activities are in process. There has been a growing recognition that the due process clause protects the right of privacy, another form of "liberty," from unwarranted governmental interference. **Mapp v. Ohio**, 367 U.S. 643, 6 L.ed. 2d 1081; See also **Poe v. Ullman**, 367 U.S. 497, 6 L.ed. 2d 989, 1004, 1022-1026 (dissenting opinions); **Gilbert v. Minnesota**, 254 U.S. 325, 335, 336 (dissenting opinion); **Public Utilities Commission v. Pollack**, 343 U.S. 451, dissenting opinion). The state cannot meet the burden of showing that any valid governmental purpose is furthered by depriving individuals of the privacy of their homes and a marital relationship solely because the mate they have chosen is of a different race.

All of which is respectfully submitted this 6th day of December, 1962.

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CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing brief was mailed to the office of the Attorney General in Tallahassee, Florida this 7th day of December, 1962.

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Office-Supreme Court, U.S.

FILED

OCT 12 1964

JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

No. 11

DEWEY McLAUGHLIN, *et al.*,

Appellants,

—v.—

FLORIDA.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

REPLY BRIEF FOR APPELLANTS

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TABLE OF AUTHORITIES

CASES	PAGE
Brown v. Board of Education, 347 U. S. 483	3
Burnette v. State, 157 So. 2d 65	15
Forceier v. State, 133 So. 2d 336	15
Gomillion v. Lightfoot, 364 U. S. 339	3
Hamilton v. State, 152 So. 2d 793	15
Henderson v. State, 20 So. 2d 649	17
Missouri ex rel. Gaines v. Canada, 305 U. S. 337	3
Nixon v. Condon, 286 U. S. 73	3
Nixon v. Herndon, 273 U. S. 536	3
Strauder v. West Virginia, 100 U. S. 303	3
Williams v. Georgia, 349 U. S. 375	18
STATUTES	
Civil Rights Act of 1866, 14 Stat. 27	2, 3, 4, 12, 19
Fla. Stat. Ann. §924.32 (1)	14, 15, 16
Fla. Stat. Ann. §918.10	13
OTHER AUTHORITIES	
Bickel, "The Least Dangerous Branch"	13
Bickel, "The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1 (1955)	4-12
Cong. Globe, 39th Cong. 1st Sess.	2, 3
2 Florida Jurisprudence (1963)	15, 16

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REPLY BRIEF FOR APPELLANTS

The purpose of this reply brief is to respond to two questions posed by appellee in its brief: the first of these is "Whether the Fourteenth Amendment affects the state anti-miscegenation statutes"; the second of these is "Whether the question of the constitutional validity of state anti-miscegenation laws is present in the instant case."

I. "*Whether the Fourteenth Amendment affects the state anti-miscegenation statutes.*" In pages 10-37 of appellee's brief the argument is thought to be made that the legislative history of the Fourteenth Amendment precludes the application of the Amendment to state anti-miscegenation laws. Specifically, appellee claims to have demonstrated (Brief of Appellee, pp. 35-36):

that the purpose of the Amendment was to validate the provisions of the Civil Rights Act [of 1866] and place them beyond the power of the Judiciary to nullify, and the power of the Congress to repeal.

It was the opinion of those who spoke in behalf of the Civil Rights Act that it had no application to marriage contracts, anti-miscegenation statutes or the right of suffrage. . .

In short, appellee's argument advances in two steps: (1) that the Civil Rights Act of 1866 (which appears as Appendix A, *infra*) was understood to have no impact on anti-miscegenation statutes, and (2) that Section 1 of the Fourteenth Amendment was understood to be coterminous with the Civil Rights Act of 1866.

Appellants acknowledge the force of the first proposition. But appellants take strong issue with the second proposition.

The simplest way to test the second proposition—under which appellee would precisely equate the guarantees of the Civil Rights Act of 1866 and those of Section 1 of the Fourteenth Amendment—is to inquire whether or not there are other forms of state-ordained racial discrimination which, like anti-miscegenation statutes, are plainly outside the ambit of the Civil Rights Act but which have been declared by this Court to be proscribed by the Amendment.

To make this test it would be appropriate to refer to the speech made by Congressman James F. Wilson of Iowa, manager of the Civil Rights bill in the House, when he brought the bill up for discussion on March 1, 1866. Congressman Wilson had this to say of Section 1 of the bill as it was originally proposed (Cong. Globe, 39th Cong., 1st Sess. 1117):

This part of the bill . . . provides for the equality of citizens of the United States in the enjoyment of "civil rights and immunities." What do these terms mean? Do they mean that in all things civil, social, political, all citizens without distinction of race or color, shall be equal? By no means can they be so construed. Do they mean that all citizens shall vote in the several states? No. . . . Nor do they mean that all citizens shall sit on the juries, or that their children shall attend the same schools.

As the March debates wore on the wording of the bill was somewhat altered; but its substantial meaning, in the respects already noted by Congressman Wilson, did not change. On the last day of the House debate Congressman Wilson, speaking of the bill as it was finally enacted into law, again reiterated its limited impact (*id.* at 1294-95):

My friend . . . knows, as every man knows, that this bill refers to those rights which belong to men as citizens of the United States and none other; and when he talks of setting aside the school laws and jury laws and franchise laws of the States by the bill . . . he steps beyond what he must know to be the rule of construction which must apply here, and as a result of which this bill can only relate to matters within the control of Congress.

Thus, as authoritatively expounded, the Civil Rights Act of 1866 was not to "mean that all citizens shall vote in the several States," nor "that all citizens shall sit on the juries, or that their children shall attend the same schools." For the Act would not have the effect "of setting aside the school laws and jury laws and franchise laws of the States. . . ." However, and this is the decisive point, Section 1 of the Fourteenth Amendment, which appellee seeks to equate exactly with the Civil Rights Act of 1866, has operated to set aside "the school laws" (*Missouri ex rel. Gaines v. Canada*, 305 U. S. 337; *Brown v. Board of Education*, 347 U. S. 483) and "jury laws" (*Strauder v. West Virginia*, 100 U. S. 303), and "franchise laws" (*Nixon v. Herndon*, 273 U. S. 536; *Nixon v. Condon*, 286 U. S. 73; cf. *Gomillion v. Lightfoot*, 364 U. S. 339, 349 [concurring opinion of Whittaker, J.]) "of the States"

In short, this Court has for decades applied the Fourteenth Amendment to problems of discrimination which

were manifestly outside the ambit of the Civil Rights Act of 1866. And so appellee's attempt to equate the limited and particularistic guarantees of the Civil Rights Act with the spacious rights enshrined in the Fourteenth Amendment must fail—unless, of course, the legislative history of the Amendment, properly understood, leads to the conclusion that this Court fell into fundamental error in each of these historic interpretations of the Amendment.

But the legislative history of the Amendment, properly understood, yields no such conclusion. The definitive study of that history is, of course, the article published by Professor Alexander M. Bickel in November, 1955, entitled "The Original Understanding and the Segregation Decision," 69 *Harv. L. Rev.* 1. In his "Summary and Conclusion," Professor Bickel traces the limited goals of the abortive Freedmen's Bureau Bill and the ultimately enacted Civil Rights Act. Then he states the case for the oft-asserted equation—repeated in the Brief of Appellee—of the Civil Rights Act with the Fourteenth Amendment. And then he shows why the attempt to tie the generalized provisions of the Amendment to the particularized provisions of the statute will not hold water. So cogent is Professor Bickel's analysis of this massive problem of constitutional interpretation that appellants take the liberty of quoting here some extended excerpts from the closing pages of Professor Bickel's article (69 *Harv. L. Rev.* at 56-65 [footnotes not included]):

As we have seen, the first approach made by the 39th Congress toward dealing with racial discrimination turned on the "civil rights" formula. The Senate Moderates, led by Trumbull and Fessenden, who sponsored this formula, assigned a limited and well-defined meaning to it. In their view it covered the right to contract, sue, give evidence in court, and inherit, hold,

and dispose of real and personal property; also a right to equal protection in the literal sense of benefiting equally from laws for the security of person and property, including presumably laws permitting ownership of firearms, and to equality in the penalties and burdens provided by law. Certainly able men such as Trumbull and Fessenden realized that each of the seemingly well-bounded rights they enumerated carried about it, like an upper atmosphere, an area in which its force was uncertain. Thus it is clear that the Moderates wished also to protect rights of free movement, and a right to engage in occupations of one's choice. They doubtless considered that their enumeration somehow accomplished this purpose. Similarly, the Moderates often argued that one of the imperative needs of the time was to educate, to "elevate," to "Christianize" the Negro; indeed, this was almost universally-held doctrine, from which even Conservatives like Cowan and Democrats like Rogers did not dissent. Hence one may surmise that the Moderates believed they were guaranteeing a right to equal benefits from state educational systems supported by general tax funds. But there is no evidence whatever showing that for its sponsors the civil rights formula had anything to do with unsegregated public schools; Wilson, its sponsor in the House, specifically disclaimed any such notion. Similarly, it is plain that the Moderates did not intend to confer any right of intermarriage, the right to sit on juries, or the right to vote.

The Civil Rights Bill itself, as brought from the Senate to the House, split the alliance of various shades of Moderates and Radicals which constituted the Republican majority. The bill was presented to the House as a measure of limited objectives, following Trum-

bull's views. But a substantial number of Republicans were troubled by the issue of constitutionality. Others were uneasy on policy grounds about the reach of section I, but inclined to believe that the bill could be rendered constitutional by amendment, and, in any event, out of mixed motives at which one can only guess, conquered their apprehensions and voted for it in the end. Bingham, whose position was in this instance entirely self-consistent, thought the bill incurably unconstitutional, its enforcement provisions monstrous, and the civil rights guaranty of very broad application and unwise. The concession these Republicans wrung from the leadership was the elimination of the civil rights formula and thus the avoidance of possible "latitudinarian" construction. The Moderate position that the bill dealt only with a distinct and limited set of rights was conclusively validated.

Against this backdrop, the Joint Committee on Reconstruction began framing the fourteenth amendment. In drafting section I, it vacillated between the civil rights formula and language proposed by Bingham, finally adopting the latter. Stevens' speech opening debate on the amendment in the House presented section I in terms quite similar to the Moderate position on the Civil Rights Bill, though there was a rather notable absence of the disclaimers of wider coverage which usually accompanied the Moderates' statements of objectives. A few remarks made in the Senate sounded in the same vein. For the rest, however, section I was not really debated. Rogers, whose remarks are always subject to heavy discount, considering his shaky position in the affections of his own party colleagues, raised "latitudinarian" alarms. One or two other Democrats in the House did so also. But more and more, debate turned on section 3 and not much else. The focus of attention is well indicated by Stevens'

brief address immediately before the first vote in the House. In this atmosphere, section 1 became the subject of a stock generalization: it was dismissed as embodying and, in one sense for the Republicans, in another for the Democrats and Conservatives, "constitutionalizing" the Civil Rights Act.

The obvious conclusion to which the evidence, thus summarized, easily leads is that section 1 of the fourteenth amendment, like section 1 of the Civil Rights Act of 1866, carried out the relatively narrow objectives of the Moderates, and hence, as originally understood, was meant to apply neither to jury service, nor suffrage, nor antimiscegenation statutes, nor segregation. . . .

If the fourteenth amendment were a statute, a court might very well hold, on the basis of what has been said so far, that it was foreclosed from applying it to segregation in public schools. The evidence of congressional purpose is as clear as such evidence is likely to be, and no language barrier stands in the way of construing the section in conformity with it. But we are dealing with a constitutional amendment, not a statute. The tradition of a broadly worded organic law not frequently or lightly amended was well-established by 1866, and, despite the somewhat revolutionary fervor with which the Radicals were pressing their changes, it cannot be assumed that they or anyone else expected or wished the future role of the Constitution in the scheme of American government to differ from the past. Should not the search for congressional purpose, therefore, properly be twofold? One inquiry should be directed at the congressional understanding of the immediate effect of the enactment on conditions then present. Another should aim to discover what if any thought was given to the long-range effect, under future circumstances, of provisions necessarily intended for permanence.

That the Court saw the need for two such inquiries with respect to the original understanding on segregation is clearly indicated by the questions it propounded at the 1952 Term. The Court asked first whether Congress and the state legislatures contemplated that the fourteenth amendment would abolish segregation in public schools. It next asked whether, assuming that the immediate abolition of segregation was not contemplated, the framers nevertheless understood that Congress acting under section 5, or the Court in the exercise of the judicial function would, in light of future conditions, have power to abolish segregation.

With this double aspect of the inquiry in mind, certain other features of the legislative history—not inconsistent with the conclusion earlier stated, but complementary to it—became significant. Thus, section 1 of the fourteenth amendment, on its face, deals not only with racial discrimination, but also with discrimination whether or not based on color. This cannot have been accidental, since the alternative considered by the Joint Committee, the civil rights formula, did apply only to racial discrimination. Everyone's immediate preoccupation in the 39th Congress—insofar as it did not go to partisan questions—was, of course, with hardships being visited on the colored race. Yet the fact that the proposed constitutional amendment was couched in more general terms could not have escaped those who voted for it. And this feature of it could not have been deemed to be included in the standard identification of section 1 with the Civil Rights Act. Again, when it rejected the civil rights formula in reporting out the abortive Bingham amendment, the Joint Committee elected to submit an equal protection clause limited to the rights of life, liberty, and

property, supplemented by a necessary and proper clause. Now the choice was in favor of a due process clause limited the way the equal protection clause had been in the earlier draft, but of an equal protection clause not so limited: equal protection "of the laws." Presumably the lesson taught by the defeat of the Bingham amendment had been learned. Congress was not to have unlimited discretion, and it was not to have the leeway represented by "necessary and proper" power. One would have to assume a lack of familiarity with the English language to conclude that a further difference between the Bingham amendment and the new proposal was not also perceived, namely, the difference between equal protection in the rights of life, liberty, and property, a phrase which so aptly evoked the evils uppermost in men's minds at the time, and equal protection of the laws, a clause which is plainly capable of being applied to all subjects of state legislation. . . .

These bits and pieces of additional evidence do not contradict and could not in any event override the direct proof showing the specific evils at which the great body of congressional opinion thought it was striking. But perhaps they provide sufficient basis for the formulation of an additional hypothesis. It remains true that an explicit provision going further than the Civil Rights Act could not have been carried in the 39th Congress; also that a plenary grant of legislative power such as the Bingham amendment would not have mustered the necessary majority. But may it not be that the Moderates and the Radicals reached a compromise permitting them to go to the country with language which they could, where necessary, defend against damaging alarms raised by the opposition, but which at the same time was sufficiently elastic to permit reasonable future advances? This is thoroughly consistent with rejection of the civil rights formula and its implications. That formula could not serve the purpose of such a compromise.

It had been under heavy attack at this session, and among those who had expressed fears concerning its reach were Republicans who would have to go forth and stand on the platform of the fourteenth amendment. Bingham, of course, was one of these men, and he could not be required to go on the hustings and risk being made to eat his own words. If the party was to unite behind a compromise which consisted neither of an exclusive listing of a limited series of rights, nor of a formulation dangerously vulnerable to attacks pandering to the prejudices of the people, new language had to be found. Bingham himself supplied it. It had both sweep and the appearance of a careful enumeration of rights, and it had a ring to echo in the national memory of libertarian beginnings. To put it another way, the Moderates, with a bit of timely assistance from Fessenden's varioloid, consolidated the victory they had achieved in the Civil Rights Act debate. They could go forth and honestly defend themselves against charges that on the day after ratification, Negroes were going to become white men's "social equals," marry their daughters, vote in their elections, sit on their juries, and attend schools with their children. The Radicals (though they had to compromise once more on section 3) obtained what early in the session had seemed a very uncertain prize indeed: a firm alliance, under Radical leadership, with the Moderates in the struggle against the President, and thus a good, clear chance at increasing and prolonging their political power. In the future, the Radicals could, in one way or another, put through such further civil rights provisions as they thought the country would take, without being subject to the sort of effective constitutional objections which haunted them when they were forced to operate under the thirteenth amendment....

It is such a reading as this of the original understanding, in response to the second of the questions propounded by

the Court, that the Chief Justice must have had in mind when he termed the materials "inconclusive." For up to this point they tell a clear story and are anything but inconclusive. From this point on the word is apt, since the interpretation of the evidence just set out comes only to this, that the question of giving greater protection than was extended by the Civil Rights Act was deferred, was left open, to be decided another day under a constitutional provision with more scope than the unserviceable thirteenth amendment. Some no doubt felt more certain than others, that the new amendment would make possible further strides toward the ideal of equality. That remained to be decided, and there is no indication of the way in which anyone thought the decision would go on any specific issue. It depended a good deal on the trend in public opinion. Actually, one of the things the Radicals had contended for throughout the session, and doubtless considered that they gained by the final compromise, was time and the chance to educate the public. Such expectations as the Radicals had were centered quite clearly on legislative action. At least this holds true for Stevens. These men were aware of the power the Court could exercise. They were for the most part bitterly aware of it, having long fought such decisions as the *Dred Scott* case. Most probably they had little hope that the Court would play a role in furthering their long-range objectives. But the relevant point is that the Radical leadership succeeded in obtaining a provision whose future effect was left to future determination. The fact that they themselves expected such a future determination to be made in Congress is not controlling. It merely reflects their estimate that men of their view were more likely to prevail in the legislature than in other branches of the government. It indicates no judgment about the powers and functions properly to be exercised by the other branches.

Had the Court in the *Segregation Cases* stopped short of the inconclusive answer to the second of its questions handed down at the previous term, it would have been faced with one of two unfortunate choices. It could have deemed itself bound by the legislative history showing the immediate objectives to which section I of the fourteenth amendment was addressed, and rather clearly demonstrating that it was not expected in 1866 to apply to segregation. The Court would in that event also have repudiated much of the provision's "line of growth." For it is as clear that section I was not deemed in 1866 to deal with jury service and other matters "implicit in . . . ordered liberty" to which the Court has since applied it. Secondly, the Court could have faced the embarrassment of going counter to what it took to be the original understanding, and of formulating, as it has not often needed to do in the past, an explicit theory rationalizing such a course. The Court, of course, made neither choice. It was able to avoid the dilemma because the record of history, properly understood, left the way open to, in fact invited, a decision based on the moral and material state of the nation in 1954, not 1866.

The present relevance of Professor Bickel's masterly study is abundantly clear: The Civil Rights Act of 1886 was not intended to apply to laws excluding Negroes from juries or from the franchise, denying them admission to public schools or relegating them to segregated schools, or forbidding them to marry their white fellow-citizens. But this Court has found—and properly so—that racial discriminations in jury service, the franchise, and public schools are all proscribed by the Fourteenth Amendment. The instant case calls for the application of the Amendment to antimiscegenation statutes. And, as Professor Bickel pointed out only two years ago, "the constitutionality of antimiscegenation statutes . . . would surely seem to be

governed by the principle of the *Segregation Cases*. . . .”
Bickel, The Least Dangerous Branch, p. 71.

II. “*Whether the Question of the Constitutional Validity of State Anti-Miscegenation Laws Is Present in the Instant Case.*” Appellants do not propose, in this reply brief, to devote further attention to the question whether there was testimony on the basis of which the jury could have concluded—had the trial judge’s instruction not taken the issue out of the case—that appellants had contracted a common law marriage. Although opinions may differ as to how compelling the relevant testimony was, appellee’s own brief makes it plain that a juror hearing the testimony of Mrs. Goodnick and Mrs. Kaabe might reasonably have concluded that appellants were married—or that, at the very least, the prosecution had not proved the non-existence of a matrimonial relationship beyond a reasonable doubt.

What appellants wish briefly to address themselves to is appellee’s ambiguous intimation that the constitutional correctness of the trial judge’s instruction, ruling out the issue of common law marriage is not properly before this Court.

Appellee’s intimation to this effect appears at pages 52 to 53 of its brief. Appellee there relies on Section 918.10 of the Florida Statutes for the suggestion that the validity of the instruction was not before the Florida Supreme Court (and hence is not before this Court) because it had not been expressly challenged “before the jury retire[d] to consider its verdict.”

The ambiguity of appellee’s intimation arises from appellee’s apparent contrary concession on page 6 of its brief:

Appropriate appeal was taken to the Florida Supreme Court (R. 1). Such appeal initially raised all errors presently submitted to this Court (R. 12); however, in briefing the questions and in petitioning for rehearing, the appellants abandoned their position that the statute under which they were prosecuted was vague and indefinite (R. 103). (See also appendix "A" to appellee's brief wherein there is contained a photostatic copy of the only brief presented to the Florida Supreme Court by the appellants.)

In short, appellee there acknowledges that all the questions now urged by appellants were properly raised by an "appropriate appeal". And the only one of those questions said to have fallen by the wayside at a later stage was the vagueness problem, and that only by non-inclusion in the brief and the petition for rehearing. Moreover, the brief filed by appellants in the Florida Supreme Court—which appellee has added as an appendix to its brief in this Court—argued the invalidity of the instruction at length (Brief of Appellee, Appendix A pages 13-17). Finally, it may be noted that in opposing appellant's petition for rehearing in the Florida Supreme Court, appellee expressly urged that Court to rule that the validity of the challenged instruction was not properly before it—and the Florida Supreme Court denied rehearing without opinion.

If, nevertheless, appellee is to be understood as still urging that Section 918.10 of the Florida Statutes does bar consideration of the challenged instruction—and hence of the anti-miscegenation statutory and constitutional provisions on which it rests—it then seems appropriate to point out that Section 918.10 does not stand alone:

Section 924.32 (1) of the Florida Statutes provides as follows:

Upon an appeal by either the State or the defendant the appellate court shall review all rulings and orders appearing in the appeal papers insofar as it is necessary to do so in order to pass upon the grounds of appeal. The court shall also review all instructions to which an objection was made and which are alleged as a ground of appeal, and the sentence where there is an appeal therefrom. The court may also in its discretion, if it deems the interests of justice to require, review any other thing said or done in the cause which appears in the appeal papers including instructions to the jury. The reception of evidence to which no objection was made shall not be construed to constitute a ruling by the court.

The discretionary authority conferred on an appellate court by the last-quoted statutory provision has recently been commented on by the Florida Supreme Court in *Burnette v. State*, 157 So. 2d 65, 67, and by the Florida District Court of Appeal in *Hamilton v. State*, 152 So. 2d 793, 795 and in *Forceier v. State*, 133 So. 2d 336, 337. The way in which this discretion is utilized by the Florida courts is indicated by the following commentary appearing in the section on "Appeals" in volume 2 of *Florida Jurisprudence* (1963) pp. 422-23 (footnotes omitted):

The giving of instructions is subject to the rule that while timely objection should be made, errors of the trial court in this regard may be reviewed on appeal in the absence of an objection if the error is so fundamental as to justify such action, or when the appellate court, in its discretion, deems the interests of justice to so require. Whether the omission of the court to instruct on a particular point will be regarded as fundamental depends on the evidence in the case and the seri-

ousness of the charge involved. Thus, the failure to instruct the jury on the weight to be given a confession in a capital case, where the conviction rests primarily on that confession, may justify reversal though no objection was interposed thereto. On the other hand, the failure to give such an instruction in an armed robbery case, where there is evidence other than the confession in support of the conviction, will not compel a reversal if no objection thereto was raised at the trial. But where the instructions given by the court erroneously take from the jury an essential element of the crime charged by the prosecution, the error is so fundamental that the conviction should be reversed even though no objection was made at the time they were given.

Appellants submit that the instant case exactly fits within the last sentence of the quoted paragraph from *Florida Jurisprudence*. For the trial court's instruction removing the common law marriage issue from the jury's consideration followed immediately after the trial court had instructed the jury that it was incumbent on the State to prove, *inter alia*, "that defendants were not married to each other at the time of the alleged offense" (R. 93). Thus, if, as appellants contend, the instruction excluding the common law marriage issue rested upon the unconstitutional premise that Florida's anti-miscegenation laws were valid, the present case is exactly one in which "the Court erroneously" [took] from the jury an essential element of the crime charged by the prosecution . . . " In such a situation Section 924.32 (1) makes it at least proper for a Florida appellate court to review the challenged instruction without regard for whether it was specifically objected to before

the jury retired to consider its verdict. Indeed it may well be incumbent upon a Florida appellate court to exercise this revisory authority where the trial judge's intrusion upon the jury's domain is as flagrant as it was in the instant case. This may be the teaching of the Florida Supreme Court in the case of *Henderson v. State*, 20 So. 2d 649, 651:

This instruction invaded the province of the jury to the extent of taking from it the determination of every element of the offense charged except that of the intent of the accused. It is elementary that every element of a criminal offense must be proved sufficiently to satisfy the jury (not the court), of its existence.

It is contended by the State that while the charge *supra* is clearly erroneous, the error is waived by reason of the provisions of . . . subparagraph 4, Sec. 918.10, Florida Statutes 1941, same F. S. A.

We cannot agree with this view. We must bear in mind the due process clause of both our State and Federal Constitutions. We are convinced that due process of law contemplates trial in a criminal case by a fair jury, with full evidence and correct charges or instructions to the jury as to the law. Of these elements of fundamental safeguard, an accused may not be deprived either by statute or rule of court. See *Lawson v. State*, 125 Fla. 335, 169 So. 739, and cases there cited.

When the provisions of statutes collide with provisions of the Constitution the statute must give way.

At all events, whether or not it would have been incumbent on a Florida appellate court to review so crucial an instruction, even though not objected to, it is manifest from

the foregoing discussion that a Florida appellate court has ample discretionary authority to review the instruction in such an instance. Cf. *Williams v. Georgia*, 349 U. S. 375.

Respectfully submitted,

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APPENDIX A

CIVIL RIGHTS ACT OF 1866

14 Stat. 27

CHAP. XXXI.—An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

Sec. 2. And be it further enacted, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or

involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court. . . .